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No.	**Change**	**Text**
1-2	Change	"FOSTER, CHRIS" changed to "FOSTER AND CHRIS"
3	Deletion	AND RONALD LAMBERT
4-7	Change	"Dated: January 27, 2004" changed to "Dated: February 6, 2004"
8-9	Change	"FOSTER, CHRIS" changed to "FOSTER AND CHRIS"
10	Deletion	AND RONALD LAMBERT
11-12	Change	"Foster, Chris" changed to "Foster and Chris"
13	Change	"Surdenik and Ronald Lambert." changed to "Surdenik."
14	Change	"Lambert sponsors the...7, 2003. Mr. Surdenik" changed to "Surdenik"
15	Change	"sponsors the remainder of the joint" changed to "sponsors the joint"
16	Change	"negotiations after the filing of the Petition, as" changed to "negotiations, as"
17	Deletion	Q: Mr. Lambert, by whom...your title and duties?
18	Deletion	A: As Senior Vice...area and product suite.
19	Deletion	Q: Please describe your educational background.
20	Deletion	A: I graduated from the...the Order of the

		Coif.
21	Deletion	Q: Please describe your work experience.
22	Deletion	A: In 1989, prior to...UCS in September 2003.
23	Deletion	Q: Who participated in...negotiations with SBC?
24	Deletion	A: Mr. Lambert was the...in some of these.
25	Change	"leave it SBC to" changed to "leave it to SBC to"
26	Change	"Lambert that Mr." changed to "Lambert (then a...Development) that Mr."
27	Change	"During negotiations, SBC...limitation. SBC also" changed to "SBC also"

Statistics:		
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STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

United Communications Systems, Inc.	)	
	)	
Petition for Arbitration of an	)	
Interconnection Agreement with	)	Docket No. 03-0772
Illinois Bell Telephone Company	)	
d/b/a SBC Illinois Pursuant to Section	)	
252(b) of the Telecommunications	)	
Act of 1996	)	

JOINT STATEMENT OF CRAIG FOSTER~~,~~ AND CHRIS SURDENIK ~~AND RONALD LAMBERT~~

Negotiated Request**:**	July 26, 2003
135th Day Thereafter:	December 8, 2003
160th Day Thereafter;	January 2, 2003
9 Months Thereafter;	April 26, 2004

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STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

United Communications Systems, Inc.	)	
	)	
Petition for Arbitration of an	)	
Interconnection Agreement with	)	Docket No. 03-0772
Illinois Bell Telephone Company	)	
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Act of 1996	)	

JOINT STATEMENT OF CRAIG FOSTER~~,~~ AND CHRIS SURDENIK ~~AND RONALD LAMBERT~~

Q. Please state your names and business addresses.

A. Our names are Craig Foster~~,~~ and Chris Surdenik~~ and Ronald Lambert~~. Our business address is 500 W Madison, Suite 411, Chicago, IL 60661.

Q. What is your purpose in submitting this statement?

A. To provide the position of our employer, United Communications Systems, Inc. ("UCS") regarding the issues in this proceeding, and to submit pertinent facts in support of that position.

Q. Why are you submitting this statement jointly?

A. In many cases, each of us has knowledge as to different aspects of the same Issue. Were we to provide our testimony as to such Issues separately, it would be difficult for the reader to obtain a full comprehension of the entire Issue, since he or she would have to refer back and forth from one of our statements to another.

Q. Which portions of the joint statement does each of you sponsor?

A. Mr. ~~Lambert sponsors the portions of the joint statement regarding the course of negotiations between UCS and SBC through November 7, 2003. Mr.~~ Surdenik sponsors the ~~remainder of the~~ joint statement regarding Issues 6, 11, 16, 18, and 21, as well as the portion of Issue 5 relating to the process of entering into service agreements, the portion of Issue 15 relating to UCS' experience with Save and Winbacks, and the portion of the joint statement relating to ordering, billing and OSS processes. Mr. Foster sponsors the portion of the joint statement regarding the course of negotiations ~~after the filing of the Petition~~, as well as the remainder of the joint statement.

Q. Mr. Foster, by whom are you employed and what are your title and duties?

A. I am the founder, President, and Chief Executive Officer of UCS. I have overall responsibility for managing the business and carrying out UCS' business mission and plans, as well as for the relationship of UCS to its customers, underlying carriers and suppliers, and to its employees. In addition, I am responsible for the financial stability of UCS.

Q. Please describe your educational background.

A. After growing up in Illinois, I graduated from Stanford University in 1981, receiving a Bachelor of Arts degree with Departmental Honors. In 1985, I graduated from the University of Chicago with a joint Doctor of Law degree from the Law School and Master of Business Administration degree from the Graduate School of Business.

Q. Please describe your work experience.

A. In 1985, I began my full time work experience in New York at Lord, Day & Lord, where I had worked as a summer associate, in the Antitrust Department. In 1987, I joined Coudert Brothers in New York and Washington, DC with other members of the former Lord, Day & Lord Antitrust Department.

In 1992, I returned to the Chicago area and founded UCS. As a former antitrust attorney, I started UCS to provide Illinois small and medium-sized businesses through telecommunication services resale some of the advantages of competition that were being seen in the long distance market and that hopefully some day would be seen in the local exchange service industry. In general, these potential advantages included a greater choice of service providers offering lower rates at reduced commitment levels attainable by smaller businesses, affordable technological advances in voice, data and internet communications and information services, and a higher level of client care not normally provided to these businesses by the major carriers. Over time, through the advent of competition in local service, UCS has become the provider of choice not only for Illinois small and medium-sized businesses and professional firms located throughout the state, but also healthcare facilities, school districts and suburban municipalities.

Q. Mr. Surdenik, by whom are you employed and what are your title and duties?

A. I am employed by UCS as the Chief Operating Officer. As Chief Operating Officer I am responsible for the performance of the following departments: Provisioning, Billing, Customer Care, Data Services, IT, and Revenue Assurance. I am also the primary operations contact for our in-house sales group and external distributors.

Q. Please describe your educational background.

A. I graduated from the University of Illinois at Urbana-Champaign in 1994 with a Bachelor of Arts degree in Pre-Law/Political Science. In 2003, I received a Masters of Communication Science degree from Northwestern University in Evanston, Illinois. In addition, I have attended multiple training courses covering management technique and philosophy, sales, telecommunications technology, and Cisco routing.

Q. Please describe your work experience.

A. After graduation from University of Illinois in December of 1994 I was hired by the law firm of Meyer & Njus as a legal clerk. In February 1996, I was hired by MCI as an Account Executive and was eventually promoted to Assistant District Sales Manager. In June 1997, I was hired by USN Communications, Inc., a reseller of local and long distance services of Illinois and other states. I began as a Provisioner and was promoted to Provisioning Manager and then to Business Management Analyst. I was hired in November 1998 by UCS.

~~**Q: Mr. Lambert, by whom are you employed and what are your title and duties?**~~

~~**A:** As Senior Vice President for Corporate Development for UCS, I am responsible for (1) securing and managing reseller relationships with vendors that provide UCS with telecommunications services, CPE and other services for resale to UCS customers; (2) establishing and managing our direct and indirect distribution channels; (3) establishing and managing systems integrator and professional service relationships incident to our service delivery; and (4) strategic expansion of UCS' service area and product suite.~~

~~**Q: Please describe your educational background.**~~

~~**A:** I graduated from the University of Michigan, Ann Arbor in 1988 with a Bachelor of Arts Degree, majoring in Political Science. In 1992, I received a Degree of Juris Doctor from DePaul University College of Law, with Honors, and I was also a member of the Order of the Coif.~~

~~**Q: Please describe your work experience.**~~

~~**A:** In 1989, prior to attending law school, I was an account executive at Mister Leasing Corporation, a privately held automobile and equipment lessor. During law school, I worked~~

~~at Gordon & Glickson, P.C., a law firm devoted exclusively to providing strategic legal counsel to the technology marketplace. In 1992, after graduating law school, I joined Gordon & Glickson as an associate. In 1993, I joined Mayer Brown & Platt in its Chicago office. At Mayer Brown, I was an associate with a diverse transactional practice, including representing clients in M&A transactions, secured and unsecured financings, and technology transactions, including telecommunications. In May 1996, I represented Ameritech in its negotiations of interconnection agreements with various CLECs, other than UCS. In December 1996, I joined Ameritech as counsel and represented Ameritech's wholesale business unit, Ameritech Information Industry Services. Again, my duties did not involve any interface with UCS. In March, 2000, I joined Shoptalk Networks, Inc., a software development firm providing voice application software for Interactive Voice Response (IVR) implementations. I joined Shoptalk as Director of Business Development and General Counsel. In October 2000, I was promoted to VP Business Development and hired an Assistant General Counsel to take over the day-to-day legal responsibilities of Shoptalk while I focused on my business duties. From November 2002 to September 2003, I ran my own consulting business providing corporate strategy and business development services. I first started providing consulting services to UCS in November 2002 on matters unrelated to the current 251/252 negotiation request. I joined UCS in September 2003.~~

~~Q: Who participated in UCS' interconnection negotiations with SBC?~~

~~**A:** Mr. Lambert was the lead negotiator for UCS with SBC for approximately seven months. When UCS first requested negotiations with SBC under Section 252, Mr. Lambert was not an employee of UCS but instead was a retained consultant. Mr. Lambert joined UCS as the Sr. VP of Corporate Development on September 15, 2003. On November 7,~~

~~2003, after having negotiated directly with Mr. Lambert on behalf of UCS under Section 252 for more than seven months, SBC suddenly refused to continue negotiating with UCS if Mr. Lambert participated. The remaining negotiations prior to the filing of the petition were conducted by two of UCS' outside counsel, Mr. Bruce Menkes and Mr. Edward Kirsch. There were also settlement negotiations after the filing of the petition. These were conducted by Mr. Menkes and Mr. Foster, and Mr. Kirsch and Mr. Branfman (another outside counsel for UCS) each participated in some of these.~~

Q. Throughout this statement, you will be asked about SBC's position. Will you reflect in your answers your best current understanding of SBC's position?

A. Yes. However, as noted above, after the filing of the Petition, there have been settlement negotiations between SBC and UCS over several of the Issues, and it will not always be possible for us (or appropriate, given the nature of settlement negotiations) to update this information to include the very latest information provided to us by SBC in the recent past. Moreover, while there was some agreement among the negotiators, and while UCS' negotiators had authority to resolve disputed issues on behalf of UCS, the SBC negotiators lacked such authority to resolve issues on behalf of SBC. We will therefore leave it to SBC to set forth its position with respect to its settlement proposals, but reserve the right to discuss SBC's position further in our supplemental statement.

Issue 1: Definition of Resale Services

Q: Please summarize the dispute between UCS and SBC concerning Issue 1 – Definition of Resale Services?

A: SBC until recently took the position in negotiations with UCS that SBC was not obligated to permit resale of ICBs to New End Users;[1] but rather, it was obligated only to permit resale to the existing end user (*i.e.*, an assumption of the ICB).[2] On September 11, 2003, nearly eight years after passage of the Act, SBC for the first time verbally agreed in negotiations to allow UCS to resell ICBs to New End Users, and on September 24, 2003, UCS made a concrete written proposal to implement such resale. To date, however, SBC has not provided any written contract language memorializing this agreement, nor has SBC offered any ordering process for UCS to actually order an ICB for resale to New End Users.[3]

UCS' proposed language would memorialize SBC's clear obligation under long-standing principles of law to make ICBs available for resale to New End Users, as well as for assumption in order to serve the existing end user. Specifically, UCS requests that ICBs be expressly included in the definition of "Resale Services" because SBC has historically refused to make ICBs available for resale to New End Users and has failed to embody in contract language any commitment to make ICBs available to UCS for resale to New End Users.

Obtaining SBC's written contractual commitment to permit resale of ICBs to New End Users is crucial to UCS' business because, as the FCC recognized early on, absent this

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[1] As used in the Petition and UCS' Testimony, "New End Users" mean end users who were not the original party to the ICB with the incumbent LEC.

[2] See e-mail from Lee Sheehan, SBC Account Representative, to Chris Surdenik, COO of UCS, dated November 8, 2002 (UCS Exhibit 1).

[3] On December 18, 2003, the day before the statutory deadline for UCS to file an arbitration petition and a few hours before UCS' planned filing, SBC sent Mr. Menkes an e-mail that included a few bullets regarding SBC's revised position on the resale of ICBs, but was designated "CONFIDENTIAL/PART OF CONFIDENTIAL NEGOTIATIONS/NOT FOR DISCLOSURE TO ANY PARTY OTHER THAN SBC AND UNITED COMMUNICATIONS, INC." That e-mail, like SBC's earlier communications, did not provide UCS with proposed contract language or an ordering process.

commitment, ILECs can "avoid the statutory resale obligation by shifting their customers to nonstandard offerings, thereby eviscerating the resale provisions of the 1996 Act."[4] In fact, SBC currently makes extensive use of a new form of ICBs—which UCS refers to as "generic ICBs," to evade its resale obligations under the Act in Illinois.

Q: Describe a generic ICB and how it differs from SBC's traditional customer ICBs?

A: In contrast to traditional custom ICBs, which had been used prior to the advent of local competition, SBC's generic ICBs are not economically based upon the end user's special circumstances such as geographic locations, unique network architecture, configuration requirements, or other material condition unique to the end user that justifies the rates, terms and/or conditions extended to such end user. Rather, unlike traditional custom ICBs, SBC's generic ICBs are based on tariffed service offerings, but include more favorable rates, terms and conditions to end users that do not possess characteristics that justify the more favorable provisions. Instead, generic ICBs are generally the result of SBC creating an offering that is more favorable to the end user than a tariff offering in response to competitive pressures.

Q: Please provide an example of a generic ICB.

A: Certainly. An example of generic ICBs used by SBC to evade its resale obligations are the "Master Discount Agreements" and other "custom" contracts currently being used by SBC to serve municipality end users. Master Discount Agreements or "MDAs" are umbrella ICB agreements that contain attachments that provide the rates, terms and conditions of the

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4 *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket Nos. 96-98, 95-185, First Report and Order, FCC No. 96-325, 11 FCC Rcd. 15,499, at ¶ 948 (Cont'd)

Telecommunications Services provided to the municipalities. In many cases, the Attachments include Telecommunications Services that primarily describe tariffed offerings but again, contain slight variance from those tariffed offerings. Examples include expanding the Eligible Services receiving a discount, offering slightly lower rates on one or both of Band A and Band B usage ("Local Usage") and application of 18/6 billing with Local Usage rates that are not otherwise available under the tariff offerings.

In the past two years, UCS has seen a proliferation of MDAs within the municipality end user base. UCS believes this is the result of two reasons: First, we believe SBC is responding to the competitive environment and offering more favorable offerings than those provided via tariff. Second, based on the termination liability charges UCS has seen included in the MDAs, we believe that SBC is employing the MDAs as an "end around" the Commission's *Termination Liability Order*. UCS is concerned that SBC is using ICB contracts to tie end users to long term contracts with significant termination liability charges; other carriers have raised this issue in complaints before the Commission.

UCS has lost a number of end users to SBC through the MDAs, as the MDAs include attachments that describe services that include rates, terms and conditions that are more favorable than those available under SBC's retail tariffs. SBC has essentially "replicated" these MDAs amongst the municipality end user base; there are of course some differences among the specific services provided and the attachments included, but they are fairly similar in nature. SBC has provided these MDAs to the municipality end users notwithstanding that these end users do not have any unique characteristics to justify the off-tariff offerings.

(August 8, 1996) ("*Local Competition Order*").

Instead, in an apparent effort to evade its resale obligations, SBC has simply provided an offering to compete with the offering UCS was providing the municipalities, but which is not available for resale.

UCS believes the Act imposes on SBC a clear obligation to make available for resale the MDAs that it provides to the municipality end users and each other end user receiving similar generic ICB contracts. SBC has not, however, complied with that obligation. Not only does SBC not make available the MDAs for resale, it refuses to provide UCS notification that such Telecommunications Services offerings even exist. Thus, SBC has been able to shield from resale a complete set of offerings targeted at one of UCS' niche segments. The result is that SBC has been able to undercut UCS' offerings in the marketplace.

Q: What is the impact on UCS and competition of SBC's refusal to permit resale of these generic ICBs or provide a process for such resale?

A: SBC has been able to steadily eviscerate its resale obligations under the Act by progressively migrating end users from tariffed offerings to generic ICBs because, while CLECs can resell SBC's tariffed offerings at an average wholesale discount rate of 20.7%, CLECs are effectively precluded from reselling generic ICBs under SBC's existing policies and practices. The generic ICBs, which SBC has precluded UCS from reselling to New End Users, are more attractive to end users than the tariffed offerings because they offer more favorable rates, terms and conditions than the tariffed offerings for which the end users would otherwise qualify. Examples of the more favorable rates, terms and conditions that may be available in a generic ICB include one or more of the following: lower rates, higher discounts, application of discounts to "Eligible Services" that under the tariff are not entitled to such discount, applying smaller billing increments to rate elements that are not otherwise available under tariff offerings, and competitive rate review clauses (i.e., re-examining what are otherwise fixed rates during the term commitment). UCS has found that SBC generally includes in its generic ICBs only one or two elements or terms that differ from an analogous tariff offering, the minimum necessary to provide a competitive offer that secures the end user.

As a practical matter, CLECs cannot resell SBC's generic ICBs to New End Users because: (1) SBC has not established an ordering process for ICBs; (2) SBC has not established any process for resellers to learn of the existence of new ICBs or review their terms; (3) SBC requires its ICBs to be treated as proprietary by the Commission and end users; and (4) SBC does not permit generic ICBs to be sold at a wholesale discount consistent with Section 252(d)(3) of the Telecommunications Act of 1996.[5]

The combined effect of SBC's policies regarding ICBs and its efforts to shift end users from tariffed products to generic ICBs is to gut the resale provisions of the Act. By designating what is essentially an existing SBC service as a generic ICB (as opposed to a tariffed offering), SBC is able to preclude CLECs from reselling the service at the higher wholesale discount rate established by the Commission for tariffed retail services. Thus, SBC's generic ICB policies are anti-competitive, unreasonable and violate federal law and sections 13-514 and 9-250 of the Illinois Public Utility Act ("PUA").[6]

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[5] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("the 1996 Act"). The 1996 Act amended the Communications Act of 1934, 47 U.S.C. § 151 *et seq.* We refer to these Acts collectively as the "Act."

[6] Illinois PUA, 220 ILCS §§ 5/13-514, 5/9-250.

Q: Please provide an example of how ICBs are used by SBC to evade its resale obligations under section 251(c) of the Act.

A: One example is with a joint end user of SBC and UCS, Company X.[7] Company X approached UCS for a quote on a term Telecommunications Service. Based on the resale price at which UCS could purchase from SBC, UCS provided Company X a quote for the Telecommunications Service that was slightly more competitive than SBC's retail term pricing. Based on that quote, Company X authorized UCS to process its order. However, soon after Company X authorized UCS to process the quote, Company X secured a quote from SBC for the same Telecommunications Service. This quote provided a rate to Company X that consisted of approximately a 30% percent savings off the monthly rate UCS had quoted Company X and significantly below SBC's retail rate. UCS, having discussed the specific Telecommunications Service with Company X, can attest that no unique "cost-based" or other circumstances (other than competition) existed that would justify such an aggressive price. Company X immediately forwarded the SBC quote to UCS, asking "how can they [SBC] do this?" and to "[p]lease place a hold on the order."

Upon receipt of SBC's quote, UCS scoured the Resale Tariff and also reviewed SBC's Accessible Letters to determine if it had somehow missed notification of a Long Term Promotion. After its review and being unable to determine the source of the SBC pricing, UCS contacted its SBC account manager, Lee Sheehan, to inquire about the pricing made available, including whether it was part of a promotion.[8] UCS did not hear from SBC for

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7 We refer to "Company X" rather than to the company's real name at its request to protect it from retaliation from SBC.

8 This email string between Ron Lambert and Lee Sheehan is attached as UCS Exhibit 2.

almost a week; then, Mr. Sheehan responded to UCS that the pricing was not part of any promotion but was more likely the result of an ICB offered to Company X. Mr. Sheehan further stated that because the ICB was made available by SBC's retail organization and because "Industry Markets" (the SBC wholesale unit) does not make available ICBs for resale, he could not access or provide any further information to UCS.

UCS lost the above-described Telecommunications Services to SBC. Based on UCS' discussions with Company X, no special characteristics exist for the Telecommunications Services that gave rise to the ICB pricing extended by SBC. Instead, SBC simply used an ICB to lower its price in a manner that would prevent UCS from reselling the ICB to Similarly Situated New End Users. UCS has several inquiries from end users "similarly situated" to Company X for the Telecommunications Services provided by SBC to Company X. However, because SBC has failed to make that ICB available for resale, UCS must still rely on the less competitive, Resale Tariff pricing. SBC can, however, continue to quote the more aggressive prices, winning and/or retaining end users, as it did with Company X, and remains free from the competition that UCS would be able to provide if it had the ability to resell to similarly situated end users the ICB that SBC provided to Company X.

Q: How else does SBC use generic ICBs to gain a competitive advantage vis a vis CLECs?

A: Through generic ICBs, SBC is also able to effectuate what is essentially a waiver or relaxation of certain restrictions that are contained in SBC's tariffs and which apply to UCS' resale of the same Telecommunications Service. For example, as discussed further in our testimony in Issue12, SBC may waive or increase the Maximum Annual Discount, allowing SBC, when it decides to do so, to "fit" larger end users whose discount would otherwise be constrained by the Maximum Annual Discount within the parameters of a tariff offering. As noted in Issue 3, SBC may also expand the services that receive or are "eligible" for a discount under a given retail tariff offering, providing additional and/or higher discounts than are available to end users under the analogous resale tariff offering.

At any time, in response to an end user request or even at its discretion, SBC may modify a tariff offering to meet its competitive needs. The resulting Telecommunications Services created through these generic ICBs have, to date, been unavailable for resale by CLECs. Instead, CLECs such as UCS have been unreasonably limited to reselling the more restrictive Telecommunications Services made available by the Resale Tariff or assuming an ICB at a de minimis wholesale discount that can not possibly permit any CLEC to cover its costs. Further, as more fully discussed throughout our Testimony and Petition, we believe many of the tariff restrictions SBC imposes on UCS are inconsistent with the Act and Illinois law and are unreasonable and discriminatory restrictions on resale. The result of SBC's refusal to make available for resale at a reasonable avoided cost discount the Telecommunications Services it creates through its generic ICBs is a significant disparity between the respective services SBC and UCS may offer in the marketplace.

Q: Has UCS attempted to ascertain SBC's reasons for opposing UCS as to this issue?

A: Yes. In Data Request 47, UCS asked SBC to "Set forth all reasons why SBC contends that the definition of 'Resale Services' in the Agreement should not include ICBs and identify all Documents that support SBC's position." SBC refused to answer, claiming that to the extent this information is relevant, it will be provided in SBC's Response and testimony. In light of SBC's refusal to answer, UCS will respond to any SBC contentions in UCS' Supplemental Testimony.

During negotiations, SBC's only comment on UCS' proposed inclusion of ICBs in the definition of Resale Services was that SBC wanted to defer the contested language until it understood what ICB terms were included in the Appendix Resale. As discussed in Issue 2, however, one of SBC's proposals on ICBs that slightly lagged behind the parties' discussion on the definition of Resale Services was that the Appendix Resale contain <u>no</u> terms and conditions on ICBs. UCS can only conclude that SBC wished to include a high-level reference in the Agreement to obligate SBC to only make available Resale Services required by the Act and included in its Resale Tariff. With no specific mention of ICBs in the definition of Resale Services, SBC could propagate its historical position that it need not make ICBs available for resale to New End Users.

Q: Previously you mentioned "18/6 billing"; please elaborate on what you mean by 18/6 billing?

A: Yes. "18/6 billing" or "18/6" is a term that indicates that usage rates for a Telecommunications Services are being billed by the length of the call, with initial increments of eighteen seconds and additional increments of six seconds.

Q: Are all Telecommunications Services billed with 18/6?

A: No. Based on our experience, we have seen 18/6 billing applied more generally to interexchange services (i.e., toll calls, InterLATA and IntraLATA) versus Local Usage. However, because 18/6 billing provides a meaningful cost savings to the end user versus the full minute billing increments customarily applied to Local Usage, the application of 18/6 billing to certain local exchange services provides a more compelling and competitive offer.

Q: Please describe what you mean by "full minute billing increments" and explain why 18/6 billing provides a cost savings vis-a-vis full minute billing?

A: With full minute billing, the end user or CLEC billed for the usage is charged on a per minute basis with the length of a call always being rounded up to the next full minute. For example, if an end user places a call that lasts thirty-five seconds, the end user is billed for a full minute of usage. Likewise, if the end user places a call that lasts three minutes and five seconds, that end user is billed four minutes of usage under full minute increment billing.

As mentioned above, 18/6 billing provides an initial (and minimum) billing of eighteen seconds for an outbound call and additional increments of six seconds. With 18/6 billing, the end user is billed thirty-six seconds of usage for the thirty-five second call described above (versus a full minute) and three minutes and six seconds for the three minute and five second call (versus four minutes).

The 18/6 billing increments more closely reflect an end user's actual usage and by limiting the amount of "rounding up" of usage to the next full minute, lowers the end user's aggregate usage, which translates to a lower monthly bill.

Q: Can you quantify the savings an end user can experience with 18/6 billing versus full minute billing?

A: It's very easy to quantify the savings for a given end user by applying the 18/6 paradigm to an end user's actual call usage (i.e., non-rounded) for a given month. However, because an end user's savings will vary based on the specific end user's outgoing call patterns, it is more reasonable to use SBC's reported average call duration to substantively illustrate that 18/6 billing does provide a meaningful economic difference over full minute billing. Consider, for example, sixty calls ranging in duration from two minutes, thirty seconds (2:30) up to three minutes, thirty seconds (3:30) (one call of 2:30, one call of 2:31, one call of 2:32, and ending with one call of 3:30). Billing these sixty calls with full minute increments instead of 18/6 increments increases costs by approximately fifteen percent (15%). This type of price differential is very meaningful in the marketplace. And, if a business end user's typical call duration is less than average, the cost differential is greater.

Q: Is the analysis really that easy, just comparing 18/6 billing to full increment billing using the same rates?

A: Yes and no. If a rate is common to the billing options, then the answer is yes. However, for as long as we can recollect, when SBC identified in the Resale Tariff a local exchange service that offered 18/6 billing, such local exchange services generally had higher per minute rates. For example, some of the first services SBC introduced with 18/6 billing (we believe SBC referred to them as "straight rates") had per minute rates in excess of $0.03 per minute. Either concurrent with or shortly after introducing its "straight rates" offering, SBC also made available 18/6 billing through the Ameritech CompleteLink A&B Save and Ameritech CompleteLink A&B Winback programs. Although we were interested in the 18/6 billing, the A&B offerings had two limitations: First, the offerings were available only for Save and Winback (we discuss our concerns about SBC's Save and Winback offerings in our Issue 15 testimony). Second, although lower than the "straight rates," the A&B offerings still had fairly high rates for Band A and Band B usage.[9] Based on UCS' review of SBC's

[9] Ameritech CompleteLink A&B Save rates are Band A: $0.017 per minute and Band B: $0.033 per minute. Ameritech CompleteLink A&B Winback rates are Band A: $0.015 per minute and Band B: $0.030 per minute.

Resale Tariff, SBC did not make available any other resale offerings that provided 18/6 billing for Local Usage and more competitive (i.e., lower) usage rates.

UCS revisited the 18/6 billing issue in December 2002 when we received from our distributors a number of SBC retail end user bills that indicated the end users were receiving 18/6 billing. These end users were not, however, purchasing the Ameritech CompleteLink A&B Save or Ameritech CompleteLink A&B Winback offerings, which at that time were the only retail business services identified in SBC's tariffs as providing 18/6 billing. Instead, these end users had 18/6 billing associated with rates lower than the A&B offerings. Many also had references on their bills to "CompleteLink" as the subscribed offering.

UCS checked the SBC resale and retail tariffs to determine if it had overlooked an offering that now made 18/6 available with lower usage rates. Not finding such an offering in the tariffs, UCS also checked past resale and retail promotions. No promotion corresponded to the 18/6 billing and associated rates. For those end users that UCS had LOAs to pull Customer Service Records, UCS could find no reference (USOC or other note) that indicated the 18/6 feature. Accordingly, UCS reasonably assumed that the 18/6 billing was being provided to end users as part of an ICB offering.

Q: Did UCS ever request that SBC make available 18/6 billing to UCS?

A: Yes. At various times during 2000 and 2001, UCS asked its account manager whether SBC would be willing to provide UCS with 18/6 billing on UCS' wholesale usage. SBC declined to do so, stating that it did not make 18/6 billing available except as otherwise provided in its tariff.

As noted above, 18/6 billing again became a topic of UCS' interest when it started to see in December 2002 and early 2003 18/6 increments reflected in SBC retail end user bills that did not correspond to published tariff offerings. Because SBC had recently refused UCS access to ICBs,[10] UCS decided to raise the issue as a general business request in its interconnection negotiations with SBC under § 252. UCS raised the issue of 18/6 billing in its first two meetings/negotiation sessions with SBC. In each of those meetings, UCS referenced the SBC retail end user bills with 18/6 billing and requested that SBC make available the 18/6 billing to UCS. SBC's negotiation team stated they would discuss the issue with SBC's product marketing group. A few weeks later Mr. Sheehan represented that the SBC negotiation team had raised the issue but that product marketing would not make 18/6 billing available to UCS except as specifically provided in the SBC tariffs.

On an August 4, 2003 conference call with SBC's negotiation team, UCS once again raised the issue of gaining access to 18/6 billing. SBC's product marketing representatives on the call, Chris Edwards and Janet Stucker, said that they would raise the issue with Jeff Gay. UCS also included its request for 18/6 billing in its Statement of Issues list provided to SBC on August 14, 2003, which issue list was requested by SBC on the August 4th conference call.[11] SBC did not respond to UCS' Statement of Issues list as it represented it would but approximately two weeks later, Lee Sheehan advised Ron Lambert (then a consultant to UCS, but since September 15, 2003, UCS' Senior Vice President for Corporate Development) that Mr. Gay had concluded SBC would not make available 18/6 billing except as specifically provided in the Resale Tariff. In response, Ron Lambert asserted that the Ameritech CompleteLink A&B offerings did not provide a viable resale offering for UCS

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[10] See UCS Exhibit 1.

[11] See Issue Numbers 5 and 6 of "UCS Statement of Issues List," e-mailed to Mary Pat Regan and Lee Sheehan of SBC on August 14, 2003, attached as UCS Exhibit 3.

and that UCS believed that SBC was making 18/6 available under other circumstances, given that the rates UCS had found in the SBC retail end user bills did not correspond to the CompleteLink A&B offerings. Mr. Sheehan in turn responded that those retail end users must have received ICBs.

Q: Did UCS ever provide SBC with the SBC retail end user bills that indicated the 18/6 billing?

A: Yes, UCS provided SBC a number of the SBC retail end user bills UCS had in its possession. The first time UCS provided SBC with representative bills showing SBC retail end users with 18/6 billing that did not correspond to the Resale Tariff offerings was on September 3, 2003. On that date, Ron Lambert forwarded three SBC retail end user bills via facsimile to Mark Ortlieb of SBC.[12] The facsimile followed a conversation earlier that day between Mr. Lambert and Mr. Ortlieb regarding whether SBC was providing "off-tariff" features and pricing to "smaller" retail end users. The end user bills provided to Mr. Ortlieb were discussed in a conference call between UCS and SBC on September 4, 2003. On that call, SBC told UCS that it would not provide UCS 18/6 billing unless UCS could demonstrate that SBC was providing that feature on an individual case basis. SBC asserted that absent UCS' affirmative showing, UCS could only gain access to 18/6 for the services specifically identified in the Resale Tariff. When UCS responded that it believed it had affirmatively evidenced SBC's provision of 18/6 billing through the end user bills forwarded to Mr. Ortlieb the previous day, Mr. Dorin of SBC refused to discuss the end user bills, stating that he felt the parties were prohibited from discussing them based on CPNI

[12] See Ron Lambert September 3, 2003 facsimile to Mark Ortlieb, attached as UCS Exhibit 4.

restrictions (i.e., neither UCS nor SBC had express permission from the end users to specifically discuss their bills for this purpose).

Q: Prior to UCS' filing of its arbitration petition, did UCS raise the issue of 18/6 billing again with SBC?

A: Yes. After UCS recognized that SBC had no process in place to resell ICBs and that SBC intended to make its ICBs available at a de minimis discount, UCS again raised the 18/6 billing on a September 19, 2003 conference call. SBC reiterated that it was not required to and would not provide UCS with 18/6 billing except to the extent explicitly provided in its Resale Tariff or included in an ICB that UCS could identify (and only so long as UCS' new end users qualified for such ICB).

Q: Have the parties discussed 18/6 subsequent to the filing of the Petition in this case?

A: Yes. The parties have had several conversations over the last two weeks regarding 18/6 billing. In connection with those discussions, UCS has provided a number of additional SBC retail end user bills to SBC.

SBC's initial response during the most recent discussions on 18/6 billing was that SBC definitely did not make 18/6 available outside of the offerings identified in its tariffs. UCS responded by pointing out that UCS had evidence, previously provided to and confirmed by SBC in earlier negotiations, that SBC was making available 18/6 billing to its retail end users via ICBs. On January 14, 2004, UCS provided SBC with additional copies of the end user bills that UCS had previously provided to Mr. Ortlieb and some additional end user bills.[13] SBC responded that the retail bills UCS had provided SBC did not indicate that 18/6 billing was provided on the specific services the parties were discussing (CompleteLink, CompleteLink Select II Save and CompleteLink Select II Winback) and therefore SBC was not required to make 18/6 billing available on those services. Specifically, SBC again reiterated that the increments identified in the retail end user bills may not even be 18/6 billing and that it was UCS' burden to affirmatively show they were 18/6 billing.

On January 20, 2004, UCS provided SBC with the copy of an SBC retail end user bill that provided 18/6 billing on a CompleteLink Select II offering.[14] Shortly after its receipt of the CompleteLink Select II bill, SBC stated for the first time that it would make available 18/6 billing to UCS on "postalized rates." In our first conversations on this topic, SBC referenced a "postalized rate" as a flat rate per minute, as opposed to a rate that is established by a discount off a different referenced rate. SBC then confessed that it currently makes available 18/6 billing on all retail services and/or rate elements that have a "postalized rate" for Local Usage. Although SBC agreed to provide UCS 18/6 billing on wholesale services having postalized rates, SBC would not commit to providing it for any specific term (e.g., the length of a Service Agreement).

Q: Did UCS point out that the SBC Resale Tariff does not identify services having postalized rates as having 18/6 billing for Local Usage and if so, what was SBC's response?

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[13] See end user bills attached as UCS Exhibit 5.

[14] See end user bill attached as UCS Exhibit 6___.

A: Yes, UCS specifically noted that the postalized services included in the Resale Tariff did not (other than the CompleteLink A&B offerings) identify those services as being billed in 18/6 increments. SBC responded that it was not necessary to specify billing increments in its tariffs as the increment SBC provided for a given service or rate element was, in the absence of a specific tariff provision, a "discretionary billing function." SBC further asserted that it reserved the right to specify the billing increments and may, notwithstanding any end user or CLEC expectation, modify at its discretion its billing system and the resulting billing increments.

Q: Do you agree that 18/6 billing is simply a discretionary billing function?

A: No. Given the highly significant economic impact 18/6 billing can have vis-a-vis full minute billing on an end user and a CLEC's usage bill, we believe 18/6 billing is a material term and condition of a service. As such we believe SBC's failure to specify the 18/6 billing as a term and condition of the services having postalized rates is a violation of the filed rate doctrine, the Communications Act of 1934, as amended,[15] the PUA[16] and the Commission's Administrative Code.[17]

Further, UCS believes SBC's log-standing failure to identify that it has been making available 18/6 billing to end users purchasing services with postalized rates, especially given

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[15] "The Communications Act…requires the filed tariff to show not only 'charges' but also the 'classifications, practices and regulations affecting such charges,' 47 U.S.C. Section 203(a); and…makes it unlawful to 'extend to any person any privileges or facilities in such communication or employ or enforce any classifications, regulations, or practices affecting such charges' except those set forth in the tariff, Section 203(c)." *AT&T v. Central Office Telephone, Inc.*, 524 U.S. 214, 223-224 (1998).

[16] Section 9-102 of the PUA, requiring that SBC "state separately all rules, regulations, storage or other charges, privileges and contracts *that in any manner* affect the rates charged or to be charged" (emphasis added); see also Section 9-104 of the PUA.

[17] Section 745.20.

UCS' repeated requests for 18/6 billing, is an intentional misrepresentation or at best, a negligent misrepresentation, as well as a discriminatory practice, that violates Sections 9-250 and 13-514 of the PUA.

Q: Has UCS attempted to use the discovery process to understand the circumstances under which SBC offers 18/6 billing?

A: Yes. UCS served five data requests on SBC seeking to understand SBC's position on making available sub-minute increment, including 18/6, billing.[18] SBC refused to answer, claiming for each request that UCS sought information that is not relevant to the subject matter of the issues in the arbitration proceeding and is not reasonably calculated to lead to the discovery of admissible evidence. On Data Request 18[19], SBC responded further stating "[n"]otwithstanding these objections and without waiving them, SBC Illinois states that SBC Illinois' tariff and promotional offerings are publicly available."[20] While SBC is correct that the tariff and promotional offerings are publicly available, as noted above, it is the provisions regarding sub-increment billing that SBC has concealed from the general public, while making available to end users ordering certain services.

Q: Given SBC's recent admission that it does not identify in the Resale Tariff or its Resale Notification when 18/6 billing is available, does UCS propose any specific language to address any concerns it has on undocumented features or terms and conditions of Telecommunications Services offered by SBC?

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[18] UCS Data Requests 13 and 14; UCS Discovery Requests 18, 21 and 22.

[19] "Produce all tariff offerings, promotional offerings, and ICBs under which SBC provides billing in less than full minute increments (initial or subsequent) for Band A and for Band B." UCS Data Request 18.

A: Yes. First, UCS is hopeful that the Commission will take appropriate remedial action to ensure that SBC's tariffs accurately reflect in accordance with applicable law all classifications, practices and regulations affecting such charges. UCS also proposes the following additional language be included in the parties' Agreement at either Section 1.1.21 or Section 3.1.1 of the Agreement to protect UCS for the period prior to the date when SBC includes such supplement in its tariff:

> The Resale Services provided under this Agreement shall include not only the rates, features, functions, classifications, practices and regulations ("the Service Terms") included in, as applicable, the Resale Tariff, Resale Notification and any ICB contract made available for resale under this Agreement, but shall also include any Service Terms that SBC provides to a competitive local exchange carrier and/or to its retail end users for the analogous Telecommunications Service that are not documented or specifically identified in the foregoing instruments ("Undocumented Service Terms"). If SBC discovers at any time that it is providing Undocumented Service Terms to a retail end user or a competitive local exchange carrier, SBC shall, as soon as commercially feasible, provide CLEC with written notice identifying such Undocumented Service Terms.

<u>Issue 2 – Notice to CLECs of ICBs Available for Resale</u>

Q: Please discuss the nature of the Parties' dispute regarding this issue.

A: The FCC has explicitly held that ICBs are telecommunications services that ILECs are required to offer for resale by CLECs to New End Users at a wholesale discount rate.[21] Obviously, however, CLECs cannot resell ICBs of which they are unaware. Thus, the resale provisions of the Act contemplate that UCS must have some mechanism to learn the terms of SBC's ICBs promptly upon their being made available by SBC to its end users, and to order

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[20] UCS's Production of Document Requests, SBC's Response to Data Request 18.

[21] *In the Matter of Application of BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-Region, InterLATA Services in South Carolina*, CC (Cont'd)

ICBs from the ILEC. Although nearly eight years have passed since after the passage of the Act, SBC still not implemented any process to provide CLECs with timely notice of the material terms of its ICBs and the ability to order ICBs for resale to New End Users. It is UCS' position that his failure not only violates federal law, but is also intended to "knowingly impede the development of competition" in the resale market in violation of sections 13-514 and 9-250 of the PUA.

Q: During negotiations, did UCS propose a process for the resale of ICBs to SBC?

A: Yes. After SBC verbally agreed to make available ICBs for resale New End Users, UCS asked SBC how it intended to make the ICBs available. SBC admitted that it had no processes in place to provide notice of its ICBs and that it had not thought through the terms and conditions by which SBC would make its ICBs available for resale. Recognizing that SBC did not have in place a process to provide UCS notice of and access to its ICBs, on September 23, 2003 UCS proposed contract language that it believed established a reasonable and nondiscriminatory process for the resale of ICBs. Based on discussions between the parties and UCS' further review of other precedence on the resale of ICBs, UCS modified its proposed language and subsequently provided that language to SBC.

Q: Please describe UCS' proposed process for the resale of ICBs to New End Users?

A: UCS proposes that SBC make available all of its ICBs (i.e., existing and in effect) for CLEC review on a secure website accessible only to SBC and CLECs (referred to by UCS as the "ICB Site"). Access via a website will mitigate the unreasonable restrictions on resale, including unreasonable delays that might arise if CLECs were required to visit the

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Docket No. 97-208, FCC 97-418, Memorandum Opinion and Order, 13 FCC Rcd. 539, at ¶ 212 (1997) ("*South Carolina 271 Order*").

Commission's or SBC's offices to review ICBs. Also, access via the ICB Site reduces the burden on SBC required to provide each CLEC with rapid notice and copies of newly available ICBs.[22] By a posting on the ICB Site, SBC could at one time meet its obligation to notify all Illinois CLECs. UCS proposes that SBC either make *all* of the actual ICBs available for review or provide a detailed summary of each ICB, in each case with *only* the end user identifying information redacted. UCS underscores that it does *not* request access to the names or any proprietary identifying information about the end users to whom SBC has sold the ICBs. UCS has agreed that SBC may withhold this information from UCS. If SBC provides an ICB summary in lieu of the actual redacted ICB, UCS proposes that SBC include in the summary all information necessary for a CLEC to evaluate whether it wishes to resell the ICB, including all of the rates, terms and conditions that differ from the applicable tariff, and sufficient information to enable the CLEC to determine which end users are "similarly situated"[23] to the end user to whom SBC sold the original ICB.[24]

SBC should be required to post all of its ICBs on its website, as, for example, BellSouth does in Tennessee,[25] and list all of the eligibility requirements on the website that SBC believes a CLEC must meet in order to resell the ICB to New End Users. Absent this information, UCS will be unable to determine whether SBC seeks to impose restrictions on

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[22] UCS urges the Commission to take an active role in defining and/or approving the features of the ICB Site to ensure that the site does not impose any unreasonable restrictions on resale by failing to provide CLECs with prompt, accurate and complete notice of SBC's new and existing ICBs. The timeliness and quality of the notice will be dictated by the availability and functionality of the ICB Site and SBC should not be permitted to frustrate a CLEC's right to resell ICBs through an implementation that fails to provide CLECs with appropriate notice of ICBs.

[23] The question of which end users are "similarly situated" is discussed in Issue 4, below.

[24] UCS also proposes that SBC identify the wholesale rates that apply to each ICB, which is consistent with SBC's provision to CLECs of wholesale rates that apply to wholesale promotions.

[25] *See* < http://cpr.bst.bellsouth.com/pdf/tn/filings/tnfiling.htm>.

resale that fail the FCC's three-pronged test that require that such restrictions must be reasonable, non-discriminatory, and narrowly tailored.[26] The posting of these eligibility criteria is especially important in light of the fact that the FCC has determined, with narrow exceptions, that such restrictions on resale of ICBs to new end users are presumptively unreasonable.[27] In addition, it would be inappropriate for SBC to seek to impose previously unknown eligibility requirements on UCS' resale of ICBs at the time UCS submits an order. Such a conclusion would create an environment for disputes on the reasonableness of the eligibility requirements imposed and more than likely result in significant delays and frustration to the involved end user(s).

Several states other than Tennessee have requirements that ICBs be made public. West Virginia requires Verizon to post its ICBs,[28] and Verizon has also agreed with the Maine commission to post ICBs.[29] The Kentucky commission had relaxed its rules regarding the posting of ICBs, but has come to regret this decision, as a recently initiated rulemaking indicates.[30]

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[26] *Local Competition Order*, at ¶ 939 (ILEC "resale restrictions are presumptively unreasonable."); 47 C.F.R. §§ 51.605(e), 51.613; *South Carolina 271 Order*, at ¶ 218 (FCC Orders grant "state commissions the authority only to approve 'narrowly-tailored' resale restrictions that an incumbent LEC proves to a state commission are reasonable and nondiscriminatory.").

[27] *Id.*

[28] "[I]if Verizon is excused from compliance with Rule 39, competitors will have no idea that an ICB exists, much less whether prospective customers are similarly situated and whether pricing terms are competitive." Bell Atlantic Tariff Filing, WV P.S.C. Case No. 00-0650-T-T, Order (Jan. 3, 2001).

[29] Entry of Verizon-Maine Into the InterLATA (Long Distance) Telephone Market Pursuant to Section 271 of the Telecommunications Act of 1996, Me. P.U.C. Docket No. 2000-849, 2002 Me. PUC LEXIS 116 *114, § IV.H.3 (Apr. 10, 2002).

[30] "In relaxing our requirements in regard to BellSouth's CSAs . . . it appeared at that time that, given the competitive conditions of the marketplace, detailed review of each CSA was no longer necessary. However, our action in that docket may well have disadvantaged telecommunications customers and CLECs who no longer are able to review the full CSAs." Inquiry into the Use of Contract Service Arrangements by Telecommunications Carriers in Kentucky, Ky. P.S.C. Case No. 2002-0456, Order at 3 (Dec. 19, 2002).

Q: Within what time interval should SBC be required to post its ICBs or summaries on the proposed website?

A: For new ICBs, UCS proposes that SBC make the terms of all ICBs available via the ICB Site within ten (10) business days of SBC's execution of the ICB contract. UCS believes the ten (10) business day timeframe is reasonable in light of (i) the competitive necessity for CLECs to receive timely notice of new ICBs[31] and (ii) SBC's current procedures, which provide that SBC (by an authorized representative through SBC's contract management group) is the last party to sign and thus give effect to an ICB.

Q: How would your proposal address the existing ICBs that SBC has already filed with the Commission as proprietary documents?

A: UCS proposes that SBC make all of its "existing" ICBs on file with the Commission available over the ICB Site by no later than twenty (20) days after the Effective Date of the Agreement. This date corresponds to approximately mid-May 2004 and given that SBC verbally agreed on September 11, 2003 to provide UCS with access to its ICBs, should be ample time for SBC to have prepared the ICB Site and the associated ICBs.

Q: Does SBC have an ordering process in place for UCS and other CLECs to order ICBs for resale to New End Users?

A: No. Nearly eight years after passage of the Act, SBC still has no process for a CLEC to order and resell an ICB to a New End User. This fact remains one of UCS' biggest

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[31] SBC is required to provide *advance* notice of new Telecommunications Services it makes available via promotions and tariff filings. Given that the Telecommunications Service required to be resold under an ICB does not "exist" until the ICB is executed, advance notice is not feasible. The only solution is to provide notice as soon as reasonably possible after creation of the ICB such that CLECs are not unreasonably disadvantaged.

concerns; when asked how SBC would provision resold ICBs, SBC's negotiator replied "not a clue."

SBC does, however, have a process for CLECs to assume an ICB (i.e., resell an ICB to the existing end user). As requested in UCS' Petition, the Commission should direct SBC to establish a standard ordering process for the resale of ICBs that would enable CLECs to resell ICBs on a parity basis with respect to time to market.

Q: During your negotiations, has SBC made any proposals regarding any aspects of a process for the resale of ICBs?

A: Yes. SBC proposed three positions during negotiations. SBC's initial position regarding ICBs was that SBC need not provide any notice to UCS or other CLECs of the ICBs available for resale and that "you [UCS] can sell what you can find." By this SBC suggested that although SBC policies deliberately hide the existence of ICBs, if UCS did somehow learn of an ICB available in the marketplace, UCS could submit a request to SBC for access to that ICB. SBC's initial proposal, apart from being flippant, would provide UCS no direct knowledge of the *terms* of any ICBs available in the market even if UCS did happened to find the proverbial "needle in the haystack" and learn of the *existence* of an ICB, because SBC requires, as a condition of entering into ICB contracts with its end users, that the end user keep the terms of the agreement confidential. Hence, the existing end user could not under the terms of the ICB disclose the terms of the ICB to UCS. In any event, SBC has no process in place for resale of ICBs to New End Users so there is no practical means of reselling an ICB under SBC's initial proposal, even if UCS were to somehow learn of the existence of a specific ICB.

Q: What was the nature of SBC's second ICB proposal?

A: Rather than comment on UCS' proposal for an ICB web site which SBC received on September 23, 2003, SBC maintained during negotiations that section 13-509[32] of the PUA itself provided a viable process for providing notice to CLECs and access to ICBs. And, because section 13-509 was required by applicable law, SBC further represented that the Agreement need not include any terms and conditions regarding ICBs as "13-509 provided UCS everything UCS needed".

Q: What is your view of SBC's assertion that Section 13-509 of the PUA provides the existing process for resale of ICBs to New End Users?

A: SBC's position is flawed for several reasons. First, SBC's position disregards the fact that section 13-509 was not intended by the Commission to set forth a process for CLECs to access and resell ICBs and does not expressly provide CLECs with a right to even review ICBs. In addition, even if section 13-509 did provide UCS an express right to request access to the ICBs that SBC has on file with the Commission, at SBC's request, the Commission accords proprietary treatment to any ICBs that are submitted pursuant to section 13-509. Thus, even if the Commission interpreted section 13-509 to allow CLECs to review SBC's ICBs, it is unable to provide CLECs access to those ICBs to which SBC has requested proprietary treatment. This would appear to be an easy issue to fix, given that SBC controls the proprietary treatment of its ICBs; however, UCS' experience suggests it may be a more formidable obstacle.

When UCS brought up the fact initially that SBC could accord its ICBs proprietary treatment, SBC assured UCS that it would not frustrate the notification process by doing so.

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[32] Illinois PUA, 220 ILCS 5/13-509.

In later discussions, when UCS advised SBC of its concerns that section 13-509 did not on its face provide UCS a substantive right to review--much less resell--SBC's ICBs, SBC inquired whether UCS had attempted to review SBC's ICBs. When UCS answered no, SBC criticized UCS for raising an issue that was likely a "non-issue," as SBC's ICBs were available for review. SBC also reiterated its statement that it would not frustrate the notification process by requesting proprietary treatment of its ICBs.

Shortly after that meeting, UCS contacted the Commission Staff to request access to the ICBs SBC had on file with the Commission. The result of UCS' inquiries was that all of SBC's ICBs were identified as proprietary and that the Commission could not reveal the ICBs to UCS unless the Commission received permission to do so from SBC. That same day, UCS wrote a letter to Ms. Mary Pat Regan of SBC advising her of the unavailability of the ICBs and requesting that SBC lift the proprietary treatment so that UCS could review the ICBs on file.[33] On October 29, 2003, UCS wrote a second letter that requested that SBC provide UCS access to review two specific ICBs.[34] After not receiving any response from SBC on UCS' two letters, UCS' counsel, Bruce Menkes, wrote another letter to SBC on November 18, 2003 requesting a response to UCS' October 28th and 29th letters.[35] SBC did not respond to that letter either. As of the date this testimony is submitted, SBC has refused

[33] This letter is attached as UCS Exhibit 7.

[34] This letter is attached as UCS Exhibit 8.

[35] This letter is attached as UCS Exhibit 9.

to remove the proprietary treatment of its ICBs[36] and has failed to provide access to the two ICBs that UCS requested to review.

Perhaps the most important flaw in SBC's position is that Section 13-509 was not enacted to provide, and therefore does not provide, a form and timing of notice sufficient to meet a CLEC's need for timely access to ICBs in order to meet the competition. Section 13-509 currently requires that SBC file with the Commission, within thirty days of SBC entering into an ICB, a written "notice" that "shall identify [for the Commission] the general nature of all such agreements, the parties to each agreement, and a general description of differences between each agreement and the related tariff."[37] A thirty day waiting period for UCS and other CLECs to review the new Telecommunications Services available for resale through such ICBs is unreasonably long. Even if proprietary treatment were no longer an obstacle and a CLEC could gain access to review the ICBs promptly after the thirtieth day,[38] the CLEC would still require additional time to analyze the Telecommunications Services available from such offering and implement a resale program. Thus, a CLEC might not be able to market the Telecommunications Services available from the new ICB for 45-60 days. This extended period for which ICBs would, as a practical matter, be exempt from resale is unreasonable. For new Telecommunications Services, SBC generally provides no less than thirty days *advance* notice of their prospective availability.

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[36] In UCS' contract proposals and in its request to review SBC's ICBs, UCS has always requested that SBC redact any customer identifying information and UCS has been willing to execute a non-disclosure agreement, to the extent SBC believes the parties' existing agreement does not adequately protect SBC.

[37] Illinois PUA, 220 ILCS 5/13-509.

[38] Section 13-509 also does not contain any provisions—nor should it given its primarily oversight purposes—discussing how a CLEC would gain access to review the ICBs. Ostensibly, each CLEC wishing to review new ICBs would have to make a daily visit the Commission's offices in Springfield and either take notes on or make copies of the desired ICBs. This is, of course, patently unreasonable.

Q: What was the nature of SBC's third ICB proposal?

A: SBC provided its third position on December 18, 2003, approximately five weeks after SBC initially promised to provide a revised position. SBC marked this proposal "CONFIDENTIAL" and "NOT FOR DISCLOSURE" outside of UCS, so UCS is unable to discuss SBC's latest proposal in its Verified Statements.[39]

Q: Has UCS attempted to use the discovery process to require SBC to set forth the rationale for its position?

A: Yes. UCS served three data requests on SBC seeking to ascertain the basis for SBC's contentions on this issue.[40] SBC refused to answer, claiming that to the extent this information is relevant, it will be provided in SBC's Response and testimony. In light of SBC's refusal to answer, UCS will respond to any SBC contentions in UCS' Supplemental Testimony.

Issue 3 – Applicable Wholesale Discount

Q: Please summarize the dispute between UCS and SBC concerning Issue 3 – Applicable Wholesale Discount Rate?

A: UCS maintains that SBC should be required to make available its generic ICBs for resale by UCS to New End Users at an interim service-specific wholesale discount rate equal to the wholesale discount rate that was established by the Commission in Docket Nos. 95-0458 and 95-0531 (average discount rate of 20.7%),[41] subject to true-up within thirty (30)

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[39] Should SBC discuss any aspect of its December 18th ICB proposal in its Response or Verified Statements, UCS reserves its rights to address SBC's proposal in its Supplemental Verified Statements and Briefs in this proceeding.

[40] UCS Data Requests 41, 42, and 46.

[41] *AT&T Communications of Illinois, Inc.: Petition for a total local exchange wholesale service tariff from Illinois Bell Telephone d/b/a Ameritech Illinois and Central Telephone Company pursuant to Section 13-*
(Cont'd)

days of the effective date of a final Commission order establishing a permanent wholesale discount rate that conforms to section 252(d) of the Act and FCC rules 51.605, 51.607, and 51.611. SBC, on the other hand, maintained during negotiations that the Commission has established a wholesale discount of 3.16% that applies to both the assumption of an existing ICB by a CLEC and the resale of a custom or generic ICB to a New End User. UCS requested that SBC provide a docket number in which the Commission had approved the 3.16% rate for the resale of an ICB to a New End User but SBC has declined to respond to this request. SBC's December 18 proposal varies the discount applicable to the resale of ICBs to New End Users, but, as discussed above, SBC's decision to designate the proposal as not to be disclosed to others precludes us from discussing it. Suffice it to say, however, this proposal is unacceptable to UCS.

Q: Why is it important to UCS' business plan and competition that the Commission establish an interim wholesale discount rate for the resale of ICBs to New End Users?

A: As previously discussed in Issue 1 above, SBC increasingly enters into "generic ICBs" that are nearly identical to the terms (as opposed to the rates) of standard tariffed products for the obvious purpose of frustrating competition from resellers. In contrast to traditional custom ICBs, these generic ICBs are not economically based upon the end user's special circumstances such as geographic locations, unique network architecture or configuration requirements, or other material conditions unique to the end user that justify the rates, terms and/or conditions extended to such end user. Rather, these generic ICBs

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505.5 of the Illinois Public Utilities Act et al., Docket Nos. 95-0458, 95-0531 consol., 172 P.U.R.4th 434 (June 26, 1996) ("*Illinois Avoided Cost Case*").

contain only minor variations from tariffed service offerings such as a more favorable billing increment and/or more favorable pricing.

SBC is able to avoid competition from resellers by progressively migrating end users from tariffed products to generic ICBs because (1) resellers are unable to learn the terms of, or even the existence of, these ostensibly "proprietary" ICBs from the Commission, SBC or the end user; (2) SBC has not established an ordering process for generic ICBs; and (3) resellers presently cannot obtain the standard discount on the resale of these ICBs to New End Users consistent with Section 252(d)(3) of the Act. SBC utilizes generic ICBs to shift end users progressively to ostensibly nonstandard offerings and create a huge loophole in its resale obligation under section 251(c)(4) of the Act that threatens to gut resale as a viable business. SBC uses the generic ICB device to eviscerate is resale obligations and will be able to continue to do so unless the Commission establishes an interim wholesale discount falls within the FCC's default range and a process for access to and ordering of ICBs.

Q: Describe how SBC uses generic ICBs to undermine resale competition?

A: SBC uses the generic ICB device to subject resellers to a price squeeze. This price squeeze is automatically put into effect whenever SBC files a copy of an agreement or a description of an agreement that contains provisions "differing from tariffs" under section 13-509 of the PUA. By the mere act of filing the agreement under section 13-509, SBC is able to evade all of the established rules regarding resale of retail tariffed offerings, including the standard discount and notice provisions, even though the generic ICB is nearly identical to the tariffed offering. SBC is neatly able to avoid resale competition: the filed agreement is not subject to the rules for resale of tariffed services, and is automatically placed in the nebulous realm of ICBs, for which SBC has failed to establish an ordering process or notice process for resale and can argue for a lower wholesale discount. At the same time, the standard tariff offering, which *is* available for resale, is always less competitive than the nearly identical generic ICB offered by SBC that is inaccessible to CLECs.

The standard offering will always be less competitive than SBC's ICBs because SBC deliberately designs these generic ICBs to be more attractive to end users in order to undermine competition from resellers. SBC accomplishes this by providing slightly lower rates and/or terms that are somewhat more favorable than those available under the retail tariff. Examples of the more favorable rates, terms, and conditions that may be available in a generic ICB include one or more of the following: lower rates, higher discounts, application of discounts to "Eligible Services" that under the tariff are not entitled to such discount, applying smaller billing increments to rate elements that are not otherwise available under tariff offerings, and competitive rate review clauses (*i.e.*, re-examining what are otherwise fixed rates during the term commitment).

The Alabama Public Service Commission ("Alabama PSC") recognized that generic ICBs could be used by ILECs in this manner to eviscerate their resale obligations. The Alabama PSC was concerned that if ICBs were only available for resale at a substantially reduced wholesale discount rate, then ICBs would become a loophole for ILECs to avoid resale entirely, at least for large end users. Specifically, the Alabama PSC determined:

> We are fearful that allowing an incumbent LEC to completely avoid its resale obligations for CSAs would allow such LECs to use CSAs in an anti-competitive manner. If LECs are not required to resell CSAs at the wholesale rate, LECs will be in a position to underprice their competitors by simply offering a CSA with a lower price. Under such a scenario, the LECs would

> have anti-competitive incentive to migrate all their large customers to CSAs in clear contravention of the Act and its underlying purposes.[42]

The Commission should recognize that SBC has adopted policies that are similar to those the Alabama PSC warned of and should adopt UCS' proposed language to ensure that resale remains available as a market entry strategy as intended by the Congress and the FCC.[43]

The Alabama PSC implemented a permanent wholesale discount rate at 16.3% for resale of BellSouth residential and business services.[44] In addition, the Alabama PSC required all CSAs be made available for resale minus that same wholesale discount.[45]

Q: Why should the wholesale discount rate for resale of ICBs to New End Users be similar to the wholesale discount rate established for other retail services?

A: In order to preclude SBC from continuing to eviscerate its resale obligations under the Act, the Commission must establish an interim wholesale discount rate for resale of generic ICBs to New End Users that is consistent with its decision in the *Illinois Avoided Cost Case* and is the same discount that is applied to the nearly identical services when sold under tariff. Such a rate, which the Commission has calculated to average 20.7%,[46] falls within and slightly below the mid-point of the default range established by the FCC of 17%

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[42] *Arbitration Between AT&T Communications of the South Central States, Inc. and BellSouth Telecommunications, Inc.*, Al. P.S.C. Docket No. 25703, Joint Order on Reconsideration, at § III(B)(1)(c) (May 14, 1997).

[43] *Local Competition Order*, at ¶¶ 12, 32 ("The Act contemplates three paths of entry into the local market – the construction of new networks, the use of unbundled network elements of the incumbent's network, and resale. The 1996 Act requires [the FCC] to implement rules that eliminate statutory and regulatory barriers and economic impediments to each.").

[44] *Generic Local Resale*, Al. P.S.C. Docket No. 25677, Order, at II(D) (December 10, 1997).

[45] *Arbitration Between AT&T Communications of the South Central States, Inc. and BellSouth Telecommunications, Inc.*, Al. P.S.C. Docket No. 25703, Further Order on Arbitration, at II(D) (April 10, 1998).

[46] *Illinois Avoided Cost Case*, at * 22.

to 25%.[47] This level of discount is appropriate in light of the fact that SBC's generic ICBs represent only minor variations on standard tariffed offerings, such that the avoided costs are substantially the same for resold tariffed services and resold generic ICBs.

As an alternative basis for such a rate, UCS maintains that established FCC rules require that in the event the ILEC fails to submit an avoided cost study to establish a wholesale discount for resale of generic ICBs to New End Users, FCC rule 51.611 requires the establishment of a discount rate within a "default" range of 17% to 25% that would apply until such time as the Commission has an opportunity to review a fully complaint avoided cost study to establish a final rate.[48]

Q: Have other states established a wholesale discount rate for ICBs that is consistent with the interim rate proposed by UCS?

A: Yes. In fact, many states have enacted the same wholesale discount rates for ICBs that apply to other telecommunications services. For instance, the Indiana Utility Regulatory Commission ("IURC") determined that tariffed services in ICBs would be subject to the 21.46% wholesale discount for resellers that purchase operator and directory services ("OS/DA").[49] Moreover, the IURC rejected a proposed Ameritech wholesale discount of 3.39% for assumed ICBs in 2001 because it did not comply with the IURC's wholesale

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47 *Local Competition Order*, at ¶¶ 908, 910, 932-33; 47 C.F.R. § 51.611 ("The state commission may establish interim wholesale rates that are at least 17 percent, and no more than 25 percent, below the incumbent LEC's existing retail rates . . . [and the] same discount percentage rate shall be used to establish interim wholesale rates for *each* telecommunications service.") (emphasis added).

48 *Id.*

49 *Local Telephone Exchange Competition*, I.U.R.C. Cause No. 39983, Order, at [7-9](b)(3) (October 15, 1997) (requiring ICBs be offered for resale with the wholesale discount) and *Commission Investigation and Generic Proceedings on Ameritech Indiana's Wholesale Rates Under the Telecommunications Act of 1996 and Related Indiana Statutes*, I.U.R.C. Cause No. 41055, Order, at Appendices A-1 and A-2 (February 25, 1999) (setting the permanent wholesale discount rate).

discount requirements.[50] The Missouri Public Service Commission ("Missouri PSC") also required SBC and other carriers to offer ICBs for resale at the wholesale discount, which was set at 19.2%.[51]

Similarly the Maryland Public Service Commission,[52] the Pennsylvania Public Service Commission,[53] the Vermont Public Service Board,[54] the Kentucky Public Service Commission,[55] the Alabama PSC,[56] and the Tennessee Regulatory Authority[57] each applied their standard wholesale discount rates to ICBs.

The Commission should consider whether SBC's proposed rate of 3.16% has any legal basis. It appears from the prior examples that numerous state commissions have

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[50] *Application of Indiana Bell Telephone Company, Inc. d/b/a Ameritech Indiana, for Commission Approval of a Local Exchange Telecommunications Resale Agreement*, I.U.R.C. Cause No. 40572-INT-121 (November 20, 2001).

[51] *AT&T Communications of the Southwest, Inc.'s Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Southwestern Bell Telephone Company*, Mo. P.S.C. Case No. TO-97-40, Final Arbitration Order (July 31, 1997) (setting the Southwestern Bell wholesale discount rate). *See also, Sprint Communications Company L.P.'s Petition for Arbitration of Interconnection Rates, Terms, and Conditions and Related Arrangements with GTE Midwest Inc.*, Mo. P.S.C. Case No. TO-97-124, Arbitration Order (January 15, 1997) (requiring ICBs be available for resale with the wholesale discount).

[52] *Agreements and Arbitration of Unresolved Issues Arising Under Section 252 of the Telecommunications Act of 1996*, Md. P.S.C. Case No. 8731, Order No. 73010, at 8 and 16 (November 8, 1996).

[53] *Pennsylvania P.U.C. v. Bell Atlantic-Pennsylvania, Inc.*, R-00963578, Order (December 19, 1996) (setting the wholesale discount rate) and *Nextlink Pennsylvania, Inc.*, P-00991648; P-00991649, Order, at IX(C)(5) (September 30, 1999) (requiring ICBs be offered for resale with the wholesale discount).

[54] *Joint Petition of New England Telephone and Telegraph Company d/b/a NYNEX and Bell Atlantic Corporation for Approval of a Merger of a Wholly-Owned Subsidiary of Bell Atlantic Corporation into NYNEX*, Vermont P.S.B. Docket No. 5900, Order, at Criterion Fourteen (June 29, 1999). *See also*, *New England Telephone and Telegraph Company*, Vermont P.S.B. Docket No. 5906, Order (December 4, 1996).

[55] *The Interconnection Agreement Negotiations Between AT&T Communications of the South Central States Inc. and BellSouth Telecommunications, Inc.*, Ky. P.S.C. Case No. 96-482, Order, at I and II (February 6, 1997).

[56] *Generic Local Resale*, Al. P.S.C. Docket No. 25677, Order, at II(D) (December 10, 1997).

[57] *The Avoidable Costs of Providing Bundled Service for Resale by Local Exchange Telephone Companies*, T.R.A. Docket No. 96-01331, Order, at III (January 17, 1997). *See also, AT&T Communications of the South Central States, Inc.*, T.R.A. Docket Nos. 96-01152 and 96-01271 (January 23, 1997).

applied the same wholesale discounts to the resale of ICBs as have been applied to other telecommunications services. Therefore, the Commission should require SBC to implement the same wholesale discount to ICBs.

Q: Under your proposal, would the wholesale discount rate for generic ICBs apply to the resale of all ICBs to New End Users?

A: Yes. In applying the interim and permanent wholesale discount rates for resale of SBC's generic ICBs to New End Users, the Commission should establish a rebuttable presumption that all of SBC's ICBs are generic ICBs and not traditional custom ICBs. Under this presumption, the higher discount rate associated with generic ICBs would apply, unless and until SBC rebutted the presumption in a proceeding before the Commission by providing economic evidence that the particular ICB in question is not "generic" and is economically based upon the end user's special circumstances such as geographic locations, unique network architecture or configuration requirements, or other material conditions unique to the end user that justify the rates, terms and/or conditions extended to such end user. Such a presumption is necessary to ensure that SBC cannot continue to evade its resale obligations by deeming as ICBs service offerings that are substantially similar to tariffed retail service offerings.

Q: Did UCS attempt to use discovery to ascertain whether the SBC work activities that comprise the avoided costs of a tariffed offering differ from the SBC work activities that comprise the avoided costs of an ICB offering?

A: Yes, in Data Request 11, UCS asked SBC to "identify each step or work activity SBC takes to market, sell, execute and agreement, provision and bill a retail end user that purchases a volume discount plan or promotion made available via (i) tariff and (ii) an ICB."

SBC refused to answer this question, claiming that it was irrelevant. Clearly SBC is in possession of this information. In light of SBC's refusal to provide it, the Commission should draw an inference that the information would show that the avoided steps, and hence the avoided costs, are the same for ICBs and tariffed services.

Q: Are most ICBs into which SBC enters generic ICBs?

A: UCS doesn't know because UCS is not familiar with each of the ICBs SBC executes with its end users, and to date SBC has failed to respond to UCS' discovery requests that would answer that question.[58] In fact, UCS' Document Request 9 called for the production of SBC's ICB contracts, which would permit UCS and the Commission to determine whether or not SBC has been abusing the ICB process by entering into generic ICBs. SBC refused to provide the requested information, claiming it was irrelevant and too confidential to be produced, even subject to protective order.[59] In light of SBC's refusal to provide this information, it would be appropriate for the Commission to presume that all of SBC's ICB contracts are of a "generic" nature.

In any event, based upon UCS' experience in the marketplace, the majority of ICBs UCS has reviewed or heard about from its end users have been generic ICBs.

Q: Should the Commission set a permanent wholesale discount rate for resale of ICBs in this proceeding?

A: No. In light of the manner in which generic ICBs are utilized by SBC to eviscerate its resale obligations, the final or permanent rate for resale of generic ICBs should be set in a

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[58] Data requests 6, 8, 9, 10, 13, and 14; Document Request 9.

[59] Late in the evening on January 8, 2004 (the night before the date UCS was originally scheduled to filed its Testimony), SBC permitted Mr. Foster to review a very limited number of ICBs. This limited review did not permit Mr. Foster to draw any conclusions as to whether most SBC ICBs were or were not generic.

separate contested proceeding in order to afford all carriers and other interested parties the opportunity to participate. Upon submission of the requisite cost study by SBC, the Commission should establish a wholesale discount rate for resale of generic ICBs to New End Users pursuant to the avoided cost methodology of section 252(d) of the Act and FCC rules 51.605, 51.607, and 51.611.[60]

Issue 4 – Similarly Situated End Users

Q: Please summarize the Parties' dispute regarding Issue 4 – Similarly Situated End Users?

A: UCS believes that a definition of "Similarly Situated End User" is needed in order to avoid future disputes and to prevent SBC from refusing to offer ICBs for resale based upon the mere assertion by SBC that an end user is not similarly situated without providing any criteria by which to assess SBC's assertion. SBC has not provided either its own written proposal or any comments on UCS' proposal as to the general characteristics of the end users to which UCS may resell such ICBs. UCS proposes language to define a "Similarly Situated End User" to whom ICBs may be resold that is reasonable, non-discriminatory, "narrowly tailored" and consistent with established FCC and district court precedent.

Q: What has UCS proposed for definition of a "Similarly Situated End User"?

A: UCS proposes to incorporate language that would expressly recognize UCS' right to resell ICBs to "similarly situated" end users and defines a "Similarly Situated End User" as "an End User or an aggregation of End Users able to comply with the volume commitment, termination liability, contract term and, if applicable, any Material Condition(s) of such ICB,

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[60] 47 U.S.C. § 252(d); 47 C.F.R. §§ 51.605, 51.607 and 51.611.

in each case as expressly stated in the ICB contract." The term "Material Condition" is defined by UCS as a "reasonable, non-discriminatory and narrowly tailored material justification that is the basis for the rates, terms and conditions extended to the Original End User."[61]

Q: Why is UCS' proposed definition of a "Similarly Situated End User" reasonable?

A: UCS' proposed definition is reasonable because it is consistent with established federal and state law. More specifically, in the *Local Competition Order* the FCC concluded that "resale restrictions are presumptively unreasonable"[62] and placed the burden on the ILEC to justify *__all__* resale restrictions, with the limited exception of delineated restrictions on cross-class selling (*i.e.*, residential service resold to business customers) and short term promotions that are "in effect for no more than ninety days."[63] Further, in the *South Carolina 271 Order*, the FCC made clear in the context of resale of ICBs that FCC rule 51.613(b) regarding restrictions on resale "was intended to and grants state commissions the authority only to approve '*__narrowly-tailored__*' resale restrictions *__that an incumbent LEC proves__* to a state commission are *__reasonable__* and *__nondiscriminatory__*."[64] Thus, in order to impose a restriction on the resale of ICBs other than those expressly set forth in FCC rule 51.613(a), including restrictions as to whom UCS may resell ICBs, the ILEC must first pass a three-

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[61] UCS Arbitration Petition, Exhibit C-2, Proposed Appendix Resale § 3.3.

[62] *Local Competition Order*, at ¶ 939.

[63] 47 C.F.R. §§ 51.605(e), 51.613(b) ("Except as provided in § 51.613, an [ILEC] shall not impose restrictions on resale by requesting carrier of telecommunications services offered by the [ILEC].").

[64] *South Carolina 271 Order*, at ¶ 218 (emphasis added).

pronged test by proving to the Commission that its proposed restriction on resale is reasonable, nondiscriminatory, and narrowly-tailored to reflect some economic rationale.

In affirming a decision of the Delaware Public Service Commission decision, a federal district court determined that it was reasonable for CLECs to be required to satisfy some "material" requirements of ICBs in order to resell such ICBs to New End Users such as the "contract's specific requirements as to volume commitment, termination liability, contract term, and any material location or usage factors."[65] The court also recognized the danger that ILECs "could define 'material' expansively, thereby elevating every niggling contract detail to a 'material' term," which would "stifle" resale of ICBs.[66] Accordingly, any material location or other usage factors "have to be objective and ascertainable through straightforward verification by [the CLEC]."[67] "In other words, the materiality of these other factors must be obvious."[68] In applying these principles, the court underscored that the ILEC must establish a "practical means" for providing notice of the ICB and its material terms because a CLEC "cannot resell services of which it is unaware."[69]

In sum, UCS' proposed language is reasonable because it reflects the conclusion of the Delaware federal court and long standing FCC precedent limiting ILEC restrictions on resale to those that are material, reasonable, nondiscriminatory and narrowly tailored. UCS' language acknowledges that resale of ICBs can be limited to "similarly situated" end users

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65 *Bell Atlantic-Delaware, Inc. v. McMahon*, 80 F.Supp.2d 218, 246 (D. Del. 2000) ("*McMahon*").

66 *Id.*

67 *Id.* at 247 (internal quotation marks omitted).

68 *Id.*

69 *Id*. at 246. Consistent with this principle, in Issue 2 above, UCS has proposed the ICB Site as a practical means for SBC to provide notice of the material terms of its ICBs.

that are able to comply with material terms of the ICB. These material terms must be readily identifiable from the text of the ICB and made known to CLECs through a "practical" process such as the ICB Site proposed by UCS in Issue 2.

Q: Has UCS attempted to use discovery to ascertain the basis for SBC's position on this issue?

A: Yes. In Data Request 40, UCS asked SBC to:

> Set forth all reasons why SBC opposes defining a "Similarly Situated End User" as "an End User or an aggregation of End Users able to comply with the volume commitment, termination liability, contract term and, if applicable, any Material Condition(s) of such ICB, in each case as expressly stated in the ICB contract," and identify all Documents that support SBC's position.

SBC refused to answer, claiming that to the extent this information is relevant, it will be provided in SBC's Response and testimony. In light of SBC's refusal to answer, UCS will respond to any SBC contentions in UCS' Supplemental Testimony.

<u>Issue 5: Definition of a Service Agreement</u>

Q: Please summarize the dispute between UCS and SBC concerning Issue 5 – Definition of a Service Agreement?

A: The Parties disagree whether the Agreement should incorporate the defined term "Service Agreement." UCS has proposed the following definition of a "Service Agreement" to be included in the Agreement as Section 1.1.29:

> "Service Agreement" means an agreement entered into by CLEC and **<u>SBC-4STATE</u>** that confirms and/or acknowledges CLEC's purchase of Resale Services pursuant to the Resale Tariff or a Resale Notification and includes additional rates, terms and conditions by which CLEC will purchase and **<u>SBC-4STATE</u>** will provide such Resale Services; <u>provided</u> in order to be deemed a "Service Agreement" under this Agreement, such additional terms and conditions must include a financial commitment by CLEC to purchase Resale Services for a specific volume, term or dollar amount. By way of example only, a CompleteLink Agreement (as defined in the Appendix Resale) and CLEC's purchase and resale of a Telecommunications Service offered on an

> individual case basis (ICB) that requires CLEC to commit to a minimum volume and/or term would both be considered "Service Agreements."

UCS believes it necessary to incorporate a defined term of Service Agreement for a number of reasons, including: (1) to identify appropriately the contracts that SBC requires UCS to execute as a condition precedent to UCS' purchase of Resale Services that include a minimum revenue and/or term commitment and (2) to use the defined term "Service Agreement" substantively in the Agreement to reconcile conflicts among rates, terms and conditions of the Service Agreements, the Resale Tariff and the Agreement (such issues collectively referred to hereafter as "Conflict Provisions").

In our first conversations on how SBC intended to "paper" its deal with UCS, UCS pointed out the express conflict that would occur between what SBC and UCS had agreed upon in the Agreement on one hand and both the Resale Tariff and the Service Agreements on the other hand. When SBC stated that it did not intend to modify its Resale Tariff nor would it entertain any revisions to its standard service agreements to implement the carrier-to-carrier arrangements it had agreed upon with UCS, UCS raised the issue of how to reconcile the conflict among the various instruments with their conflicting terms that governed UCS' purchase of Resale Services.

UCS first raised the issues to SBC of the need for a defined term "Service Agreement" and the need to reconcile the Conflict Provisions in a conference call with SBC on August 4, 2003. On August 14, 2003, at SBC's request, UCS also provided SBC with a list identifying UCS' initial issues in the 251/252 negotiations, which specifically identified

(a) the need for a defined term "Service Agreement" and (b) the Conflict Provisions.[70] Finally, on September 26, 2003, UCS provided SBC with draft contract language to propose a definition of "Service Agreement" and to reconcile the Conflict Provisions. UCS slightly modified its own definition as it refined its position and provided that revised definition to SBC.

SBC has not provided UCS a substantive response as to why the Agreement should not include a definition of "Service Agreement." Instead, SBC first stated, without any explanation, that the defined term was not necessary. Later, SBC "expanded" its rationale for not including the term in the Agreement by stating that the defined term was not necessary because if the Service Agreement references the terms and conditions of the Resale Tariff, then the Agreement should reference that tariff, rather than referencing the Service Agreement.

SBC's reliance on its tariff is also the basis for its disagreement with UCS' proposals to address the Conflict Provisions. SBC's position on the Conflict Provisions is that its tariffs should control over any conflict in the rates, terms and conditions of the tariff, the Agreement or any Service Agreement. The Parties' dispute on the Conflict Provisions is more specifically addressed in testimony submitted for Issue 30.

Q: How did you come up with the term "Service Agreements"?

A: UCS actually borrowed the term from SBC. While doing some research on another issue UCS intended to raise in negotiations, UCS reviewed the Commission's order in Docket No. 0-043, which UCS refers to as the "*Termination Liability Order*." In that order, a witness for

[70] See "UCS Statement of Issues List," e-mailed to Mary Pat Regan and Lee Sheehan of SBC on August 14, 2003, attached as UCS Exhibit 3. See Issue Numbers 8 and 13.

SBC, Mr. Thomas Wilson, SBC's Executive Director, Business Core Services, Product Marketing, referred to the agreements SBC requires its retail end users to execute as a condition precedent to ordering services with a term commitment as "service agreements"[71]. SBC also commonly uses the term "service agreement" in its Accessible Letters to describe the agreement the CLEC must enter to receive the term discount offered by the promotion.[72] Because SBC uses the term "service agreement" to describe the types of contracts UCS is required to enter to purchase Resale Services with a volume, revenue and/or term commitment, UCS adopted that term for its proposal.

Q: Does SBC really require CLECs to enter into Service Agreements before furnishing service?

A: SBC required that UCS enter into a Service Agreement when UCS purchased a CompleteLink Select II Winback Signing Bonus Offer Promotion[73]. Also, during negotiations of the Appendix Resale, SBC's negotiation team stated that each purchase of CompleteLink services would require UCS to execute a separate Service Agreement, the same form of agreement that SBC requires its retail end users to execute when purchasing the same Telecommunications Services at retail. Each time UCS has inquired about purchasing Resale Services pursuant to a term plan or a MARC, SBC has forwarded to UCS one or more forms of a separate agreement, including, for example, a CompleteLink Agreement or a Confirmation of Service Order. In addition, the CLEC Handbook states that contracts must

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[71] "[W]hile the optional calling plans are offered under tariff, Ameritech requires that the customer sign a service agreement acknowledging that the customer has ordered the plan." (emphasis supplied) *Termination Liability Order* at 8.

[72] See the numerous references to "service agreement" in SBC's various Accessible Letters on Resale Promotions, including, for example, CLECAM03-407, Business Access Term Pricing Promotion, distributed on December 1, 2003.

be executed and approved before a CLEC is able to place orders and that "contracts are required for one, three and five year plans."[74] And, as noted above, testimony submitted before the Commission and recent Accessible Letters from SBC indicate that SBC treats execution of a service agreement as a condition precedent to ordering certain services that require with a volume and/or term commitment.

Q: How do the terms of a Service Agreement differ from the Resale Tariff?

A: In general, a Service Agreement is more specific than the Resale Tariff and prescribes the specific rates, terms and conditions by which the Resale Services will be provided to UCS. More specifically, the Resale Tariff publicizes the various rates, terms and conditions by which a CLEC can purchase the Resale Services while the Service Agreement is intended to evidence exactly what the CLEC did purchase. For example, the Service Agreement for UCS' purchase of the CompleteLink Select II Winback Signing Bonus Offer Promotion specifies UCS' specific (i) MARC, (ii) MAD, (iii) Term Length, (iv) Volume Discount, (v) 2-yr. Bonus, (vi) Usage Rates and (vii) Account Telephone Numbers that are entitled to the benefits of the promotion. The Resale Tariff does not and cannot provide that type of specificity with respect to a specific purchase of Telecommunications Service, whether at retail or resale.

Q: Why is it necessary to include a definition of "Service Agreement" in the Agreement?

A: The Service Agreements into which UCS will enter with SBC during the term of the Agreement will impose critically important terms and conditions on UCS' purchase of Resale

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[73] See UCS Exhibit 10.

[74] See CLEC Handbook at CompleteLink – Retention Save & Winback, Ordering (emphasis supplied).

Services from SBC that are not otherwise contained in the Agreement or the Resale Tariff. UCS' purchase of all Resale Services—including those that are purchased through a Service Agreement—are subject to the rates, terms and conditions of the Agreement. SBC has, however, refused to modify the Service Agreements to include the actual rates, terms and conditions that will apply to the purchased Resale Services. SBC has also refused to contractually commit to include an additional provision in each Service Agreement to identify that the Resale Services purchased through the Agreement are subject to rates, terms and conditions of a separate and non-referenced instrument—i.e., the Agreement. Because SBC has refused to modify the terms and conditions of the Service Agreements to specify that the Resale Services purchased under those Service Agreements are subject to the rates, terms and conditions of the Agreement, it is important to specify that fact in the Agreement. In order to accomplish that goal and create the appropriate reference, one must first define the Service Agreements to be identified in the Agreement. If there is no term to appropriately identify the Service Agreements executed by UCS and SBC, it will be impossible to reference those agreements and ensure that UCS receives the benefit (and burden) of the rates, terms and conditions of the Agreement.

Even more importantly, the Service Agreements that SBC requires UCS to execute also contain rates, terms and conditions that in some respects expressly conflict with the rates, terms and conditions included in the parties' Agreement and the Resale Tariff. For example, in the Appendix Resale, SBC has agreed for its provision of the Ameritech CompleteLink Offering to UCS to: (1) remove the MAD and Business Location Restriction, (2) allow UCS to enter into multiple "CompleteLink Agreements" and (3) provide an "Additional Discount". Each of these terms directly conflict with (or, with respect to the

"Additional Discount", are not reflected in) the Resale Tariff or SBC's form Service Agreements for CompleteLink. This conflict again results from SBC's refusal to modify the form of its various Service Agreements so that they are consistent with a carrier-to-carrier resale relationship, instead maintaining the form that it uses with its retail end users.

If not specifically addressed, the conflict between the terms of the Agreement and the subsequently executed Service Agreements will have unintended results in that the conflicting terms of the Service Agreements (which were unilaterally promulgated by SBC) may be given priority over the provisions negotiated and arbitrated in this proceeding that are included in the Agreement; specifically, this means superseding terms that have been agreed by the Parties and included by virtue of the Commission's arbitration decision.

To allow the agreement of the Parties and the decision of the Commission to survive, it is important to establish a hierarchy that reconciles the express conflict among the various instruments that govern UCS' purchase of Resale Services. To establish that hierarchy and apply the substantive "rules" of conflict, it is first necessary to identify or define a Service Agreement as one of those instruments.

SBC has actually already agreed to apply this "hierarchy of conflict" with respect to one form of Service Agreements—the CompleteLink Agreement. In Section 2.3 of the Appendix Resale, an agreed upon provision, SBC agreed to the following treatment of a conflict between the terms of the Appendix Resale and the terms of the Resale Tariff and a CompleteLink Agreement: "in the event of any conflict or inconsistency between the terms and conditions of this Appendix Resale and the terms and conditions of the Resale Tariff and/or a CompleteLink Agreement, the Parties agree that the terms and conditions of this Appendix Resale shall control and that such CompleteLink Agreement (and CompleteLink

Plan) will be interpreted to the maximum extent permissible so as to effect the intent of the Parties as set forth in this Appendix Resale."[75]

Q: Has SBC advanced any reasons why it contends the Agreement should not include a definition of "Service Agreement"?

A: No. In fact, UCS served a data request asking SBC to:

> Set forth all reasons why SBC contends that the Interconnection Agreement should not include a defined term "Service Agreement" to identify the agreement SBC requires UCS to enter when UCS purchases a volume and term offering under the Resale Tariff and Identify all Documents that support SBC's position.[76]

SBC refused to answer, claiming that to the extent this information is relevant, it will be provided in SBC's Response and testimony. In light of SBC's refusal to answer, UCS will respond to any SBC contentions in UCS' Supplemental Testimony.

Q: Why do you think SBC is opposed to incorporating into the Agreement the defined term "Service Agreement?

A: SBC has never provided a substantive reason why it is opposed to the definition. At first, similar to its responses to UCS' other proposed contract provisions, SBC simply rejected the definition without providing any rationale. After UCS asked for SBC's position several times, SBC critiqued the definition proposed by UCS and suggested that a defined term for Service Agreement was unnecessary because if the agreement primarily incorporated by reference the terms of the Resale Tariff, then the parties should simply reference the Resale Tariff. After UCS attempted several times to point out the substantive

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[75] Appendix Resale, Section 2.3.

[76] UCS Data Request 48.

reasons why a defined term “Service Agreement” was necessary, SBC simply ignored the issue.

Based on the other issues advanced by SBC, UCS believes SBC’s primary objection to the defined term “Service Agreement” is that the term, and the substantive treatment of Service Agreements entered into by the parties during the term of the Agreement, is inconsistent with SBC’s repeated attempts to have the rates, terms and conditions of all Resale Services purchased under the Agreement default to the SBC tariffs. For example, as noted in Issue 30, SBC believes that if there is a conflict in the various instruments that govern UCS’ purchase of Resale Services, SBC’s tariff should control. In Issue 31, SBC has maintained that any future modification to its tariffs should automatically modify all agreements UCS has previously executed for its purchase of Resale Services, even those agreements that are intended to provide a firm or guaranteed price for their term.

Therefore, my belief is SBC is not substantively opposed to the defined term “Service Agreement”; SBC just doesn’t like the substantive treatment UCS proposes elsewhere in the Agreement for Service Agreements and the Resale Services purchased thereunder. Because the defined term forms the basis on which to present UCS’ other more substantive issues, SBC appears to be attacking those substantive issues through the less substantive but equally important need for the defined term “Service Agreement.”

Issue 6 – Accuracy of Termination Liability Information

Q: Please summarize the dispute between UCS and SBC concerning Issue 6 – Accuracy of Termination Liability Information?

A: UCS has proposed language providing that if SBC’s Customer Service Records fail to accurately disclose that the end user being converted to UCS’ services is subject to termination liability, then SBC will waive such liability and permit the end user to re-establish service with SBC under the end user's original contract without assessing termination liability on UCS or the end user. In the McLeod Arbitration in Docket No. 01-0623, the Commission concluded that language substantially similar to that proposed by UCS was reasonable and directed that the language be incorporated into SBC's agreement with McLeod.[77] Although UCS provided its proposal to SBC on September 26, 2003 (including the citation to the Commission's relevant arbitration decision), SBC has not explained to UCS why it will not accept language that the Commission has already mandated.

Q: Is SBC required to provide termination liability information to UCS?

A: Yes. SBC is required to provide UCS with non-discriminatory and parity access to its pre-ordering Operational Support Systems ("OSS"), including access to the CSRs contained in SBC's OSS.[78]

Q: Please explain why it is important to receive timely information on termination liability and the consequences of receiving inaccurate information?

A: UCS relies on SBC's CSRs to determine whether or not to continue to invest resources in marketing to a particular end user based upon whether the end user will be deterred from switching providers because it faces substantial termination liability if it switches providers. UCS incurs expense to first identify and initiate discussions with a prospective end user. Once UCS learns that the end user is interested in learning more about

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[77] *McLeodUSA Telecommunications Services, Inc., Petition for Arbitration of Interconnection Rates, Terms and Conditions and Related Arrangements with Illinois Bell Telephone Company (Ameritech Illinois) pursuant to Section 252(b) of the Telecommunications Act of 1996*, Docket No. 01-0623, at 34-38 (Jan. 16, 2002) ("McLeod Arbitration Decision").

how UCS and the services it may offer that end user, UCS requests a letter of authorization to review that end user's CSR to determine the exact services the end user is receiving from SBC and whether there is any termination liabilities associated with those services. One of the chief determinants of whether UCS can profitably serve that end user and/or whether it makes financial sense for that end user to switch to UCS is the existence and amount of any termination liability. Thus, both UCS and the end user rely heavily on UCS' examination of the CSR to determine whether (1) UCS should continue to invest more resources in marketing to the end user and (2) whether it is financially feasible for UCS to serve the end user and for the end user to switch to UCS.

If the CSR indicates that there is no termination liability or liability in an amount that is less than the "true" liability SBC would seek to impose on the switching end user, the subsequent discovery and imposition of that liability on the end user can be damaging for both the end user and UCS. The end user almost always seeks reimbursement from UCS, in which case UCS is incurring what may be a significant, unanticipated expense to serve an end user, rendering that end user unprofitable for UCS. The expense incurred by UCS is also not simply the reimbursement of the termination liability; instead UCS has also incurred significant sales, marketing and provisioning expenses subsequent to its review of the inaccurate CSR and decision (based upon the inaccurate CSR) to continue discussions with and conversion of the end user. The end user will also be significantly inconvenienced if after transitioning to UCS, that end user must reverse the transition process and re-instate its prior relationship with SBC.

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[78] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 01-338, 96-98, 98-147, FCC 03-36, at ¶¶ 561-62 (rel. Aug. 21, 2003) ("UNE TRO
(Cont'd)

Q: Why should SBC be responsible for the accuracy of the termination liability information that it provides to UCS?

A: SBC should be liable for the accuracy of the termination liability information that it provides to UCS because SBC alone controls the accuracy of this information and end users and UCS necessarily rely on this information in order to make business decisions. Because SBC has sole control regarding the accuracy of this information, UCS maintains that SBC, not the end user or UCS, should bear the consequences of errors in SBC's CSRs. In the McLeod Arbitration, the Commission agreed that CLECs "should not be placed at a competitive disadvantage because of [SBC's] faulty database" and imposed the language sought here by UCS.[79]

Q: Has SBC provided UCS with any explanation as to why the UCS proposal is not acceptable?

A: No. SBC has not provided any reason why UCS' proposed Section 3.6 of the Agreement is not acceptable. Each time UCS inquired about the section during negotiations, SBC responded that it still needed to review the specific contract language proposed by UCS and the underlying McLeod arbitration decision.

Q: Is there any legitimate reason for SBC to be concerned about the prejudicial effect of appearing to voluntarily agree to a provision that has been previously arbitrated against it?

A: No, recognizing that SBC may desire to reserve its rights, if any, to appeal the McLeod Arbitration decision, UCS proposed a reservation of rights provision at Section 2.7

Order").

[79] McLeod Arbitration Decision, at 37-38.

of the Agreement. SBC modified UCS' proposal by proposing its "standard" non-voluntary term provision, which UCS accepted the majority of and which is reflected as agreed upon language in the Agreement. This treatment is also consistent with the manner in which SBC addresses the inclusion of adversely arbitrated terms in interconnection agreements that are not the original agreements to the Commission's adverse decision.

<u>Issue 7 – Escrow of Disputed Amounts</u>

Q: Please summarize the dispute between UCS and SBC concerning Issue 7 – Escrow of Disputed Amounts?

A: SBC's position is that UCS should be considered to be in breach of the contract (and potentially subject to termination) if it fails to pay in full all amounts billed by SBC, no matter how incorrectly the amounts were billed. Under SBC's proposal, if UCS disputes such wrongly billed amounts, it must nevertheless pay them into escrow. UCS' proposal, by contrast, would permit UCS to dispute SBC's bills without escrowing the disputed amounts, provided that: (1) UCS does not have a history of late payments; (2) UCS has established 12 consecutive months of good credit history; and (3) UCS has not filed frivolous billing disputes.

Q: Does UCS meet the three criteria of (1) not having a history of late payments, (2) having established 12 consecutive months of good credit history, and (3) not having filed frivolous billing disputes?

A: Yes. UCS has an approximately six year history of timely payments. In addition, as noted below, of the billing disputes that have been resolved, SBC has acknowledged the correctness of UCS' position as to approximately 99.8% of the disputed amounts.

Q. Did UCS attempt to ascertain through discovery what was SBC's position with respect to whether UCS filed frivolous billing disputes?

A. Yes; however SBC refused to answer, claiming the question was irrelevant since "disputed amounts must still be escrowed." This of course begs the question, which is whether, as UCS has long proposed, a CLEC that does not have a history of filing frivolous billing disputes *should not* be required to escrow disputed amounts.

Q: Did UCS also serve discovery to attempt to get SBC to state with respect to billing disputes submitted by UCS, how many dollars of disputes were resolved in UCS' favor and how many were resolved in SBC's favor?

A: Yes. SBC claimed not to have any information regarding the former, and refused to answer the latter.

Q: Why does UCS object to being required to escrow disputed amounts?

A: Such a requirement would permit SBC, through either intentional or negligent overbilling, to exhaust UCS' limited capital, leaving UCS with no choice but to pay an excessive bill – either directly to SBC or into escrow. Unfortunately, SBC has frequently overbilled UCS in the past, often as a result of SBC's inability to bill in accordance with its agreements with UCS. These types of errors have appeared, in the past, for many months in a row. This overbilling has severely damaged UCS by, among other things, depriving UCS of working capital, and making UCS appear unprofitable to potential investors. The result has been that UCS has been less effective in competing with SBC than it should have been. Based on past experience, UCS has little confidence that SBC's billing errors will not continue to be a common challenge in the future.

Q: What types of billing disputes UCS had with SBC?

A: UCS entered into a Confirmation of Service Order with Ameritech dated May 29, 1997. Ameritech continuously misbilled UCS under that agreement. The bills did not break down services provided by Ameritech, which made it impossible for UCS to verify whether UCS was being billed correctly. At the end of 1998, UCS discovered that Ameritech had been billing UCS substantially in excess of what was owed. Ameritech admitted the error, but said that it would take months to correct, and suggested that in the meanwhile, UCS should calculate the amount due and request credits. Ameritech agreed that UCS' methodology for calculating claims was correct.

Over the next approximately three years, Ameritech granted all of the claims made by UCS (which amounted to almost $1.5 million), but Ameritech never corrected its billing. In September, 2001, Ameritech began, with no explanation, to deny the exact same claims. The denials simply said "per management team." There were at least $437,000 of over-charges, but, to this day, UCS does not know the exact amount because Ameritech has refused to disclose information necessary to calculate that amount. Then, on May 29, 2002, SBC wrote to UCS stating that SBC would cease filling service orders placed by UCS unless UCS paid the disputed amount. It was obvious that this action would have ended UCS' business, since UCS is completely dependent upon SBC for the provision of local service.

On June 4, 2002, UCS sent a 48-hour notice, giving notice of UCS' intent to file a complaint under Section 13-515 of the PUA if SBC ceased filling service orders. On June 7, 2002, SBC wrote to UCS, and volunteered that if UCS put the $437,000 in escrow, SBC would not cease filling service orders. UCS deposited that amount into escrow, which has subsequently grown to $484,727.52. UCS also placed funds relating to a second dispute (the "WVBP Dispute") in the same escrow. However, on August 20, 2002, SBC again threatened to refuse to fill new service orders, and threatened in a letter dated December 2, 2002, to disconnect service. SBC claimed that the only reason for those notices was that SBC objected to the form of the escrow established by UCS, even though that escrow met the rules set out in SBC's tariff and had previously been accepted by SBC. Rather than fight SBC on the issue, UCS agreed in December, 2002 to use the escrow language requested by SBC, and transferred the funds in the new escrow on December 6, 2002. Needless to say, all three of those threats were simply improper devices to compel UCS to pay amounts that were not owed, and none of them was carried out.

The dispute over the $484,727.52 remains unresolved to this day (with SBC still refusing to state how it calculated the amount it claims is due or why UCS' calculations are wrong). The WVBP Dispute was resolved by a confidential settlement agreement, and the funds in dispute are no longer in the escrow. We are willing to discuss the settlement, (which we believe vindicates UCS' position), if SBC releases UCS from its confidentiality obligation.

Q: In whose favor were the billing disputes resolved?

A: As we discussed, SBC has, in almost all cases, ultimately admitted that the payments made by UCS were correct, and that SBC was mistaken. $2,826,639.11 of claims were submitted by UCS. Claims of $484,727.52 remain disputed, and of the rest, all except $5,847.42 have ultimately been granted. Thus, of the disputed that have been resolved, SBC has acknowledged the correctness of UCS' position as to approximately 99.8%.

Q: Do any of these disputes reflect adversely on UCS' creditworthiness?

A: No. In fact, the resolution of the disputes show that UCS' creditworthiness was never an issue.

Q: Under UCS' proposal, is there any incentive for UCS not to lodge frivolous disputes as a means of delaying payment of amounts that are actually due?

A: Yes. First, if UCS does not pay disputed amounts and the dispute is ultimately resolved in favor of SBC, UCS is required to pay a late fee of 1.5% per month, a rate that is considerably higher than SBC's cost of capital. Second, under UCS' proposal, if UCS files frivolous disputes, it will lose its right to lodge billing disputes without paying the disputed amounts into escrow.

Q: Has the Commission addressed the issue of requiring escrow for billing disputes?

A: Yes. In the arbitration between SBC and TDS Metrocom, Inc., the Commission addressed the precise issue that is before it in this arbitration. The Commission observed that despite SBC's claim that "CLECs as a class of companies are in shaky condition," there was "no evidence" that TDS was in such condition. Noting that TDS had had several billing disputes with Ameritech Wisconsin resolved in its favor, TDS "could be forced to escrow significant amounts" to contest SBC's billing errors, and concluded that because "requiring TDS to escrow disputed amounts could have the ability of reducing TDS' ability to compete . . . the language on escrow requirements should be deleted."[80]

Q: Does UCS propose that the language on escrow requirements be deleted entirely, as the Commission ordered in the TDS Metrocom arbitration?

A: No. UCS is willing to accept more moderate language. Under UCS' proposal, rather than eliminating the escrow requirement entirely, the Agreement would require UCS to escrow disputed amounts if UCS failed to meet any of three conditions: (1) that UCS does not have a history of late payments; (2) that UCS has established 12 consecutive months of good credit history; or (3) that UCS has not filed frivolous billing disputes.

Q: Has SBC advanced any reasons why it contends that the Commission should not follow the approach it took in the TDS Metrocom arbitration here?

A: No. In fact, UCS served a data request asking SBC to:

> Set forth all reasons why SBC contends that a CLEC with a good credit history, a good record of payments, and no record of submitting frivolous or unwarranted billing disputes should be required to post an escrow in the amount of the dispute as a precondition of submitting any billing disputes and Identify all Documents that support any of these reasons.[81]

SBC refused to answer, claiming that to the extent this information is relevant, it will be provided in SBC's Response and testimony. In light of SBC's refusal to answer, UCS will respond to any SBC contentions in UCS' Supplemental Testimony.

Issue 8 – Exceptions to Limitation of Liability

Q: Have UCS and SBC agreed upon basic language for limitation of liability?

A: Yes. The disagreement is over the exceptions, if any, to the agreed language.

Q: What is the nature of the disagreement over the exceptions?

A: UCS has proposed to incorporate four exceptions that the Commission approved in its August 26, 2003 decision in the arbitration involving SBC and AT&T.[82] SBC refuses to

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[80] *TDS Metrocom, Inc. Petition for Arbitration of Interconnection Rates, Terms and Conditions and Related Arrangements with Illinois Bell Telephone Company d/b/a Ameritech Illinois Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Docket No. 01-0338, Arbitration Decision, at 6 (Aug. 8, 2001).

[81] UCS Data Request 33.

[82] AT&T Communications of Illinois, Inc., TCG Illinois and TCG Chicago Verified Petition for Arbitration of Interconnection Rates, Terms and Conditions and Related Arrangements with Illinois Bell Telephone Company (SBC Illinois) pursuant to Section 252(b) of the Telecommunications Act of 1996, Docket No. 03-0239, Arbitration Decision, at 11-12 (Aug. 26, 2003) ("AT&T Arbitration Decision").

include the four exceptions that the Commission ordered in the AT&T arbitration, but has not explained why.

Q: What are the four exceptions proposed by UCS?

A: The four exceptions in which UCS proposes that the limitation of liability clause would not apply are : (1) indemnity obligations expressly set forth in the Agreement; (2) obligations under the financial incentive or remedy provisions of any service quality plan required by the FCC or any Commission; (3) credits to invoices and damages payable to a party in connection with the failure to provide adequate carrier-to-carrier service quality or to meet the carrier-to-carrier service quality prescribed by the Commission; and (4) obligations expressly provided in an Appendix, attachment, addendum or Service Agreement attached or referenced therein.

Q: What was SBC's position in the AT&T arbitration as to these four exceptions?

A: As reflected in the AT&T Arbitration Decision, SBC did "not have a problem with exceptions 1 and 4." As to exceptions 2 and 3, it proposed three types of relief: cap damages via indemnification; performance measures and penalties; and specific performance via dispute resolution/arbitration.[83]

Q: Has SBC explained why it now finds exceptions (1) and (4) unacceptable, even though it had no problem with them in the recent AT&T arbitration?

A: No.

Q: Why does UCS advocate exceptions (1) and (4)?

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[83] AT&T Arbitration Decision at 11.

A: Absent such an exception, the limitation of liability provision would undermine obligations to which the UCS and SBC had specifically agreed elsewhere in the agreement.

Q: Turning to exceptions (2) and (3), has SBC taken the same position with UCS that it took with AT&T?

A: No. Whereas in the AT&T arbitration SBC offered an alternative, SBC has offered UCS no alternative at all.

Q: What was the Staff's position with respect to exceptions (2) and (3) in the AT&T arbitration?

A: Staff supported AT&T and in some instances contended "that the provisions should be taken a little bit further" than even AT&T proposed.[84]

Q: Why does UCS believe that the Commission's decision in the AT&T arbitration was correct?

A: Because obligations under the financial incentive or remedy provisions of any service quality plan required by the FCC or any Commission and credits to invoices and damages payable to a party in connection with the failure to provide adequate carrier-to-carrier service quality or to meet the carrier-to-carrier service quality prescribed by the Commission reflect a public policy determination by this Commission, the General Assembly, and/or the FCC that certain payments must be made to foster competition and serve the public interest.[85] SBC should not be permitted to undermine that public policy determination by requiring UCS to enter into a contract under which UCS would receive a lesser amount.

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84 AT&T Arbitration Decision at 12.

85 See 220 ILCS 5/13-712(g), Docket 01-539 (Code Part 731), Docket 01-0662.

Q: Has UCS served discovery in an attempt to ascertain SBC's basis for its position on this issue?

A: Yes. UCS served a data request[86] asking SBC to:

> Set forth all reasons why SBC contends that the exceptions to the limitation on liability provisions ordered in SBC's arbitration with AT&T in 2003 should not be included in the Interconnection Agreement and Identify all Documents that support SBC's position.

SBC refused to answer, claiming that to the extent this information is relevant, it will be provided in SBC's Response and testimony. In light of SBC's refusal to answer, UCS will respond to any SBC contentions in UCS' Supplemental Testimony.

<u>Issue 9 – Presumption Against Restrictions on Resale</u>

Q: Please summarize the dispute between UCS and SBC concerning Issue 9 – Presumption Against Restrictions on Resale.

A: SBC appears to have a fundamental disagreement with UCS over the words "presumption" and "against." SBC has taken the position that UCS, and not SBC, bears the burden of proving whether a particular restriction on resale is unreasonable. In the 1996 *Local Competition Order*, the FCC concluded that, with limited exceptions as set forth in rule 51.613(a), all "resale restrictions are presumptively unreasonable."[87] The FCC stated further that it is "consistent with the procompetitive goals of the Act to presume resale restrictions and conditions to be unreasonable."[88] UCS interprets this straightforward language to mean that any restriction on resale is presumed to be unreasonable. Under this interpretation, the

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86 UCS Data Request 49.

87 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd 15499, at ¶ 939 (August 8, 1996) ("*Local Competition Order*").

88 *Id*.

party seeking to assert a restriction on resale has the obligation to rebut the presumption and demonstrate that the restriction is not unreasonable. UCS has proposed language to recognize that any restriction on resale is presumed to be unreasonable.

SBC, on the other hand, has proposed language to support its unfounded interpretation that any restriction on resale is presumed to be reasonable, until challenged by a competitive carrier. In negotiations, SBC maintained that it may impose restrictions on resale as it sees fit until a reseller files a complaint at the Commission and subsequently prevails in an appropriate proceeding.

Q: How does that square with the presumption established by the FCC rule?

A: It doesn't. Rather, SBC seeks to reverse the presumption against restrictions on resale established in the FCC rule and shift the burden of litigation to UCS and other resellers. SBC's position forces CLECs to incur the cost and delay of proving that SBC's restrictions are unreasonable, which can cause a significant disruption to the CLEC's ongoing business.

Q: Did UCS serve any discovery in an attempt to ascertain SBC's reasons for its position on this issue?

A: Yes. UCS served the following data request on SBC:

> Set forth all reasons why SBC contends that the Agreement should not include language that provides that SBC may not impose restrictions on resale unless and until such restrictions have been deemed reasonable by the Commission as provided in FCC rules 51.605(e) and 51.613(b) and identify all Documents that support SBC's position.

Again, SBC refused to answer, claiming that to the extent this information is relevant, it will be provided in SBC's Response and testimony. In light of SBC's refusal to answer, UCS will respond to any SBC contentions in UCS' Supplemental Testimony.

<u>Issue 10 – Aggregation of End User Demand</u>

Q: Please summarize the dispute between UCS and SBC concerning Issue 10 – Aggregation of End User Demand.

A: The parties disagree on whether the Agreement must include provisions enabling UCS to aggregate the demand, revenue and volume commitment of multiple end users to meet the minimum usage, revenue or volume requirements necessary to qualify for resale of ICBs and/or volume discount contracts.

Q: What is UCS' position?

A: UCS believes that it has an unequivocal right to aggregate these items.

Q: What is UCS' basis for this belief?

A: Pursuant to Sections 251(c)(4) and 252(d)(3) of the Act and applicable FCC Orders, UCS has a well-established right to aggregate the revenue, volume commitment and usage of multiple end users in order to meet the applicable material conditions for resale of an existing or any newly established volume-term service offering or ICB. Again, the FCC's *Local Competition Order* addresses this issue directly, and SBC chooses to ignore the instructions from the FCC. Specifically, the FCC stated that with respect to volume discount offerings by the ILEC, "it is presumptively unreasonable for incumbent LECs to require individual reseller end users to comply with incumbent LEC high-volume discount minimum usage requirements, so long as the reseller, in aggregate, under the relevant tariff, meets the minimal level of demand."[89] Similarly, in the *Louisiana 271 Order*, the FCC stated that "a CSA resale restriction simply forbidding volume aggregation, without economic justification,

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[89] *Local Competition Order* at ¶ 953.

is presumptively unreasonable."[90] In light of these pronouncements, SBC has already agreed to contract language with another competitive carrier that recognizes this right to aggregate the revenue, volume commitment, and usage of multiple end users.[91] Yet SBC will not agree to the same language with UCS. Instead, SBC proposes that UCS may aggregate customers only under CompleteLink contracts.

Q: In your experience, is the FCC's position that aggregation must be allowed reasonable?

A: Yes. The FCC's position contemplates that SBC would treat UCS as a single customer for each Service Agreement. Likewise, SBC's service agreements place the same obligations on UCS as would be placed on end users. For example, UCS would be liable if a MARC was not met, and SBC receives the benefit of a single point of contact, no matter how many end users UCS aggregates under a Service Agreement. SBC needs to deal with only one customer for service and billing issues. Moreover, UCS handles all collection issues with end users, and effectively guarantees the solvency of those end users. In short, aggregation does not place any increased burden on SBC, but it confers a substantial benefit to end users, who will be able to take advantage of rates and terms for which they may not have qualified individually.

Q: Did UCS serve any discovery in an attempt to ascertain SBC's reasons for its position on this issue?

A: Yes. UCS served the following data request on SBC:

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[90] *Louisiana 271 Order* at ¶ 317.

[91] Section 3.3 of Appendix Resale to Ameritech Illinois-McLeod Telecommunications Services, Inc. interconnection agreement, October 23, 2001.

> Set forth all reasons why SBC contends that UCS may not aggregate business customers for the purpose of meeting volume or usage requirements contained in an SBC volume-term service offering or ICB and reselling such services, and Identify all Documents that support SBC's position.

SBC refused to answer, claiming that to the extent this information is relevant, it will be provided in SBC's Response and testimony. In light of SBC's refusal to answer, UCS will respond to any SBC contentions in UCS' Supplemental Testimony.

<u>Arbitration Issue 11 – Notice And Resale of SBC's Long Term Promotions</u>

Q: Please set forth the Parties' disagreement regarding Issue 11 – Notice and Resale of SBC's Long Term Promotions.

A: The Parties agree that promotions that remain available for more than 90 days are "promotional offerings greater than 90 days in duration," as that term is used in ¶ 950 of the *Local Competition Order* ("Long Term Offerings"). The Parties agree that SBC is obligated by Section 251(c)(4) of the Act to make Long Term Promotions available for resale at the applicable wholesale discount rate and that promotions for ninety days or less ("Short Term Promotions") need not be made available to CLECs for resale at a wholesale discount. However, the Parties cannot agree on whether the Agreement should provide that promotions with benefits that extend past 90 days be treated as Long Term Promotions, without regard to the length of the period during which they are offered. In addition, the parties disagree on whether the provision to CLECs of 30-days advance notice of new SBC Long Term Promotions is reasonable.

Q: What is UCS' position on the definition of Long Term Promotion?

A: UCS believes that promotions with benefits extending beyond 90 days are Long Term Promotions, even if the promotion is offered for less than 90 days.

Q: What is SBC's position?

A: During negotiations, SBC rejected UCS' proposed language, stating that it was "ambiguous." SBC has not responded to UCS' assertion that its proposed language parallels almost word for word the *Local Competition Order* and the FCC's Rules.

Q: What is UCS' basis for its position?

A: In the *Local Competition Order*, the FCC stated that ILECs are prohibited from evading the obligation to offer Long Term Promotions for resale at a wholesale discount rate by allowing the end user to realize a "benefit" for more than ninety days; the FCC stated that "no benefit can be realized more than 90 days after the promotional offering is taken by the customer."[92] UCS' proposed definitions merely incorporate restrictions on ILEC conduct that the FCC has codified in its rules. As compared with SBC's language, UCS' proposed language draws a clear distinction between the Long Term Promotions that are subject to resale and the Short Term Promotions that are not subject to the resale obligation. UCS has specifically sought to incorporate a more inclusive definition of a Long Term Promotions that are subject to resale at wholesale rates because of inconsistent statements and policies advanced by SBC on prior promotions. The Commission should adopt UCS' definitions as they are a more accurate and complete statement of SBC's obligations under the FCC's rules.[93]

Q: What are the Parties' positions with respect to notice of Long Term Promotions?

A: During negotiations, SBC disagreed with UCS' proposal that SBC should be required to provide UCS with advance notice of new Long Term Promotions, in order to provide UCS with a reasonable opportunity to exercise its rights to resell them and compete on a

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[92] *Local Competition Order*, at ¶ 950; *see* 47 C.F.R. § 51.613(a)(2).

[93] See *Local Competition Order*, at ¶ 950 and 47 CFR § 51.613(a)(2).

nondiscriminatory and parity basis with SBC as intended by the Act. Although SBC currently provides CLECs notice of new Long Term Promotions through Accessible Letters distributed at least 45 days prior to the tariff effective date of such promotion[94], SBC refused to memorialize that obligation in the Agreement.

Q: What is UCS' basis for its position?

A: UCS and other CLECs require reasonable advance notice of such services so that they can modify their billing systems and marketing plans to incorporate new promotions and offer them to end users in a timely manner. UCS' proposal, that SBC provide UCS notice of Long Term Promotions "as required by Applicable Law [e.g., any Commission requirement] or, absent any requirement, not less than thirty (30) calendar days before such promotions are generally offered to **SBC-4STATE** retail End Users" would not unduly burden SBC because it is SBC's existing policy to provide forty-five (45) days advance notice of new Long Term Promotions via its Resale Notification. Further, UCS' language is also narrowly tailored to accommodate any other timeframe (shorter or longer) that may be established by the Commission. Finally, UCS' proposal prescribes a minimum notice in the absence of any Commission requirement.

Q: Has UCS had any recent experiences in dealing with SBC that justify UCS' position as to the definition of long term promotion and need for notice?

A: Yes. In late September, 2003, UCS was informed by a UCS distributor that it was encountering ISDN PRI with local loop being sold by SBC to its end users at $420.00 per month on a 36 month term (SBC's regular retail price is approximately $560.00 per month).

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[94] See SBC Response to Data Request 37.

UCS contacted Lee Sheehan of SBC, asking if this was an ICB pricing situation and he informed UCS that the product group told him this was a promotion called the "ISDN Firesale." UCS was not informed of this promotion but should have been since the benefit to the customer extended for over 90 days.

Arbitration Issue 12 – Maximum Annual Discounts Are an Unreasonable Restriction on Resale

Q: Please summarize the Parties' dispute regarding Issue 12, whether Maximum Annual Discounts are an Unreasonable Restriction on Resale.

A: The parties do not agree on whether the Maximum Annual Discount ceiling (or similar term that limits the effective discount UCS may receive when purchasing a volume discount service) SBC seeks to impose on the highest revenue tier of certain of its volume discount offerings is an unreasonable restriction on resale pursuant to 47 CFR § 51.605(e) and violates Sections 13-514 and 9-250 of the PUA.

Q: What is a Maximum Annual Discount?

A: The Maximum Annual Discount or similar term (collectively, a "MAD") is a cap on the discount that UCS (or another CLEC or one of SBC's retail end users) may receive when purchasing or reselling certain volume-discount based Telecommunications Services. For example, SBC offers certain volume-based discounts with a floor in the form of a Minimum Annual Revenue Commitment ("MARC") and a ceiling in the form of a MAD. The purchaser would have to meet its MARC but if the purchaser's total discount reached the MAD, it would receive no additional discounts on the Telecommunications Services it purchased.

Q: What is UCS' position?

A: UCS believes application of the MAD to UCS (and any other CLEC) represents a restriction on the resale of volume discount offers, which the FCC has concluded is presumptively unreasonable.[95]

Q: How does the MAD restrict resale of volume discount offers?

A: As designed by SBC, the MAD imposes at least three impermissible restrictions on UCS' resale of volume-discount based Telecommunications Services. First, the MAD precludes UCS from competing for and serving higher-volume end users. Second, the MAD restricts UCS' right to aggregate as expressly permitted by the FCC rules.[96] Third, SBC, through the application of its MAD and contrary to both state and federal precedent, seeks to dictate and limit the maximum discount(s) UCS may provide its end users. Each of these reasons, addressed more specifically below, independently establishes that the MAD is an unreasonable restriction on resale that violates 47 CFR § 51.605(e). For the same reasons, the MAD is also an anticompetitive, unjust and unreasonable restriction under §§13-514 and 9-250 of the PUA.

Q: Can you provide an example that illustrates the competitive effects of a MAD?

A: Yes. A basic example from an SBC tariff employing a MAD demonstrates that the MAD is anticompetitive and, as designed and applied, is a blatant attempt by SBC to exclude resellers from competing with it for the business of higher-volume end users. For example,

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[95] "We believe restrictions on resale of volume discounts will frequently produce anticompetitive results without sufficient justification. We, therefore, conclude that such restrictions should be considered presumptively unreasonable." *Local Competition Order*, at ¶ 953.

[96] See *Local Competition Order*, at ¶ 953 ("With respect to volume discount offerings, however, we conclude that it is presumptively unreasonable for incumbent LECs to require individual reseller end users to comply with incumbent LEC high-volume discount minimum usage requirements, so long as the reseller, in aggregate, under the relevant tariff, meets the minimum level of demand.").

consider a UCS purchase under the Ameritech CompleteLink Offering, one of SBC's volume-based discount tariff offerings tailored to business end users:

- Assume UCS makes the highest Minimum Annual Revenue Commitment ("MARC") required under the offering: $150,000.
- Based on that MARC, UCS receives a MARC Volume Discount of 12.5% per year based on a five year term commitment.[97]
- Also based on its MARC, UCS is subject to a MAD of $29,466 per year.
- Through application of the MAD, UCS may only receive the MARC Volume Discount on $235,728 of Eligible Services.[98]

Based on the above example, it is impractical for UCS to market and acquire higher-volume end users that appreciably exceed a threshold of $235,728 of Eligible Services revenue per year because each dollar of qualified (i.e., Eligible Services) revenue generated in excess of that threshold comes with a zero Volume Discount to UCS. And, except for certain promotional offerings that incorporate eligibility requirements that limit the availability of such promotional offerings, SBC does not make available for resale via tariff a Telecommunications Service that offers a lower effective rate or higher discount than the Ameritech CompleteLink Offering. Accordingly, the MAD, on its face, imposes a significant restriction on the resale of the Ameritech CompleteLink Offering and SBC's other

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[97] The example is based on a MARC greater than/or equal to 10% Toll-Band C.

[98] The maximum Eligible Service revenue is determined by dividing the MAD by the MARC Volume Discount ($29,466 divided by 12.5% equals $235,728). "Eligible Services" are services that qualify for the MARC Volume Discount. For the Ameritech CompleteLink Offering, the Eligible Services are IntraMSA Toll Usage, Business Exchange Access Service, Business Trunks, Ameritech Digital Transport Service – Enhanced (ADTS-E), Local Usage Services (Bands A, B and C), ADTS-E Usage, Centrex Usage, ISDN Usage and IntraMSA/800/888 Usage.

volume-discount offerings that incorporate a MAD to the effect of excluding UCS from a given market segment—i.e., high volume business end users.

Q: What effect does the MAD have on SBC's ability to offer larger discounts to high volume business end users?

A: Very little, because SBC does not have to offer a high volume business end user a tariffed service such as CompleteLink. Instead, SBC can offer a high volume business end user an ICB that varies only minimally from the tariffed service. Therefore, when SBC's policy on making ICBs available to both retail end users and CLECs is considered, the effect of the MAD becomes even more anticompetitive and discriminatory. If a retail end user has sufficient volume to exceed the MAD at the highest revenue commitment level, SBC may offer that retail end user an ICB that allows such retail end user to obtain rates and/or discounts commensurate with its volume. In other words, the MAD only *theoretically* operates to cap an SBC end user's discount, because SBC is able to evade the cap by making an ICB offer to the retail end user.

Q: If UCS contends that SBC is subverting the MAD through use of ICB's, why doesn't UCS re-sell ICB's to high volume end users?

A: As discussed elsewhere, SBC has to date—and contrary to clear FCC precedent on the issue—withheld from UCS the resale of the same ICBs that SBC uses to serve its retail higher-volume end users. Moreover, even to the extent that SBC has in the course of negotiations expressed any willingness to allow UCS to resell ICBs, the avoided cost discount that SBC has expressed a willingness to make available to UCS is a very small fraction of the avoided cost discount for tariffed services. The combined effect of the MAD and SBC's refusal to make its ICBs available for resale at wholesale rates to New End Users operate as a structural limitation that precludes UCS from competing for higher-volume end users. Thus, the MAD, as designed and applied by SBC, is anticompetitive, unreasonable, unjust and discriminatory and violates FCC Rule 51.605(e) and Sections 13-514 and 9-250 of the PUA.

Q: What effect does the MAD have on aggregation?

A: SBC's MAD restricts UCS' right to aggregate individual reseller end users on a volume discount offering. Such restriction is inconsistent with the FCC's conclusion in paragraph 953 of the *Local Competition Order*, which expressly recognized a CLEC's right to aggregate "individual reseller end users to comply with incumbent LEC high-volume discount minimum usage requirements."

The MAD restricts the number of individual reseller end users UCS may aggregate on a given volume discount offering by imposing an absolute economic penalty above a certain threshold of revenue generated by those end users. As UCS aggregates more end users and associated volume, the MAD reduces the effective discount UCS receives on that offering. This "declining discount" imposed by SBC has the specific effect of limiting the number of individual end users UCS may aggregate under a given volume discount offering. Depending upon the volume that UCS aggregates under the volume discount offering, the application of the MAD may even eliminate the Commission-approved wholesale discount entirely.

Q: Could UCS aggregate end users into groups of limited size so that each group would exceed the MARC but not exceed the MAD?

A: No. The additional restrictions SBC has placed on its volume discount offerings preclude such a solution. Even if such barriers did not exist, requiring UCS to group together its end users to keep each group under the MAD restriction would be unreasonable and anticompetitive. Requiring UCS to allocate resources sufficient to constantly evaluate its end user base and monitor during the term the careful balance of "MARC compliance versus MAD restriction" among numerous multi-year commitments imposes unreasonable burden and expense on UCS. SBC has not offered an explanation as to why this imposition is justified. Moreover, new end users acquired by UCS would be stranded from taking service under the volume discount offerings until UCS assembled that "right mix" of end users using a given volume discount offering to again comply with the MARC/MAD parameters for that next plan. Such a delay is entirely inconsistent with UCS' right to aggregate as contained in paragraph 953 of the *Local Competition Order.*

Q: What has SBC proposed during negotiations?

A: SBC has advanced two positions on the MAD. First, since the start of negotiations, SBC's argument against removal of the MAD is that its resale offering need only "mirror what SBC provides at retail." Because MADs and other limitations are included in SBC's retail tariffs, SBC maintains the MADs and each other limitation imposed at retail also applies against UCS as a reseller of the applicable tariffed retail service.

More recently, SBC modified its position on the MAD somewhat, stating that it will remove the MAD to allow UCS to aggregate end users on a given volume-discount offering but only if (i) UCS agrees not to provide any individual end user account receiving service from UCS under such offering a volume-based discount that exceeds the discount SBC may provide a similarly situated SBC retail end user under SBC's retail tariff offering and (ii) UCS and SBC otherwise reach a negotiated agreement. In other words, SBC seeks to impose the same MAD restrictions on UCS' end users that SBC imposes on its retail end users. UCS believes SBC's efforts to secure UCS' agreement to limit the discount UCS may provide its end users to the discount SBC can apply to its end users is an inappropriate—and likely, even unlawful[99]—and anticompetitive attempt by SBC to preserve its market position relative to end users commonly served by SBC's high volume discount offerings. Even the suggestion that SBC should be permitted to dictate by contract the price at which UCS offers service is offensive.

Q: What rationale has SBC offered for this position?

A: Except for its "resale must mirror retail" position, as imposed against UCS and/or UCS' individual end users, SBC has offered UCS no rationale as to why the restrictive application of the MAD (or similar limitation) is a reasonable and nondiscriminatory restriction on resale as required by 47 CFR § 51.613(b).

SBC's "resale must mirror retail" rationale for the MAD's application to UCS and UCS' individual end users has been, and continues to be, totally inconsistent with clear FCC precedent. SBC's position that Telecommunications Services "required to be resold under the Act are subject to the same terms and conditions under which they are currently sold at retail"[100] was expressly rejected by the FCC in the *Local Competition Order*. Instead, the FCC concluded that "resale restrictions are presumptively unreasonable" and identified that "[s]uch resale restrictions are not limited to those found in the resale agreement" but also "include conditions and limitations contained in the incumbent LEC's underlying tariff."[101] Further, the FCC stated in paragraph 952 of the *Local Competition Order*:

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[99] Under the antitrust laws, it has long been held *per se* unlawful for competitors to agree as to the prices at which either of them will offer their goods or services. *E.g., United States v. Trenton Potteries*, 273 U.S. 392, 397-98 (1927).

[100] See SBC Comments to NPRM at 76.

[101] *Local Competition Order*, at ¶ 939.

> We are concerned that conditions that attach to promotions and discounts could be used to avoid the resale obligation to the detriment of competition. Allowing certain incumbent LEC end user restrictions to be made automatically binding on reseller end users could further exacerbate the potential competitive effects.

The FCC codified this principle at 47 CFR § 51.605(e) and placed the burden on the incumbent LEC to justify all resale restrictions with the limited exception of restrictions on cross-class selling and short term promotions.[102]

Q: What does UCS propose?

A: UCS proposes that the Commission adopt UCS' proposed language in Section 3.1.5.1 of the Agreement.

<u>Arbitration Issue 13 – Nondiscriminatory Application of Volume-Based Discounts on SBC Tariff Offerings</u>

Q: What is the nature of the parties' dispute concerning Issue 13 – Nondiscriminatory Application of Volume-Based Discounts on SBC Tariff Offerings?

A: SBC provides volume-based discount tariff offerings to retail end users. UCS believes (although SBC has denied it in negotiations) that SBC is providing discounts beyond those provided for in the tariffed offerings, and UCS contends that it is entitled to purchase the same tariffed offerings on terms and conditions that are reasonable and non-discriminatory.

Q: What additional discounts does UCS believe SBC provides?

A: UCS believes SBC provides retail end users purchasing volume discount offerings that include a discount restriction either in the form of (A) a waiver of that restriction, in whole or in part, or (B) a discount on top of the restriction. Waiving the discount limit or providing

[102] *Local Competition Order*, at ¶¶ 939, 952; 47 CFR § 51.605(e).

additional discounts means the retail end user receives an effective discount greater than that provided under the express terms and conditions of the offering (collectively, an "additional discount").

Q: Why does UCS believe it is entitled to receive Additional Discounts?

A: SBC must make Resale Services available to UCS on terms and conditions that are reasonable and non-discriminatory. This means SBC must provide the same additional discounts to UCS on the same basis on which it provides additional discounts to end users.

Q: Why does SBC refuse to provide Additional Discounts to UCS?

A: SBC contends that retail end users do not receive additional discounts and therefore it need not provide such discounts to UCS.

Q: Was UCS able to confirm SBC's contention through discovery?

A: No. UCS served the following data request[103] on SBC:

> State whether SBC contends that UCS is entitled to the same discount that SBC provides to its retail end users when UCS purchases a volume-based discount tariff offering from SBC for resale, set forth all reasons for such contention and Identify all Documents that support SBC's position.

SBC refused to answer, claiming that to the extent this information is relevant, it will be provided in SBC's Response and testimony. In light of SBC's refusal to answer, UCS will respond to any SBC contentions in UCS' Supplemental Testimony.

SBC has also refused to reply to UCS' other discovery requests that would provide concrete evidence as to whether SBC is in fact providing any of its end users an "additional discount".

[103] See SBC's Response to UCS Data Request No. 55.

Q: If SBC contends that it does not give additional discounts, why does UCS seek to memorialize the right to such discounts?

A: If in fact, SBC is correct that it has never provided a retail end user an "additional discount," and that it does not intend to do so, then the inclusion of this language will be harmless. Its presence will, however, ensure that if SBC decides to offer such "additional discounts," UCS will be entitled to participate in such discounts on a non-discriminatory basis.

Q: What does UCS propose?

A: UCS proposes that the Commission adopt UCS' proposed language in Section 3.1.5.2 of the General Terms of the Agreement.

<u>Issue 14 –Unreasonable Restrictions on Number of Business Locations Limits UCS' Right to Aggregate</u>

Q: Please summarize the dispute between UCS and SBC concerning Issue 14 – Unreasonable Restrictions on Number of Business Locations Limits UCS' Right to Aggregate?

A: The parties disagree as to whether SBC may impose on UCS' purchase and resale of certain volume-based discount offerings a term that limits the number of business locations UCS may include in such offering. At retail, SBC imposes a restriction that limits the number of "Business Locations" an end user may include on such offering to 250 locations per state. SBC defines a "Business Location" as "the 'service address' of the local telecommunications services; 'service address' is solely determined by Ameritech."[104]

[104] See Form CompleteLink Agreement (attached as UCS Exhibit 11) at Section 6.0.

Applied to the resale context, SBC's "Business Location Restriction" expressly limits UCS' right to aggregate end users on the applicable volume-based discount offerings. UCS believes the business location limit is an unreasonable restriction on resale that violates 47 CFR § 51.605(e) and also believes the restriction is anti-competitive and unreasonable pursuant to sections 13-514 and 9-250 of the PUA. UCS has proposed language at Section 3.1.6 of the Agreement to address its concerns.

SBC maintains that it is not required by the Act to remove the Business Location Restriction because its resale obligations under Section 251(c)(4) require it to only mirror what it makes available at retail. Since the Business Location Restriction is included in SBC's retail tariffs, SBC maintains it must also apply for resale. SBC has rejected UCS' proposed language in Section 3.1.6 of the Agreement.

Q: What is SBC's justification for the Business Location Restriction?

A: At this time, we do not know SBC's justification for the Business Location Restriction. During negotiations, SBC admitted that there is no technical provisioning or billing limitation that dictates such a restriction. In fact, if there were such a limitation, SBC would have been unable to agree, as it did, to the removal of the Business Location Restriction as it applied to the Ameritech CompleteLink Offering. This agreement is evidenced in the agreed-upon language in Section 2.2.2 of the Appendix Resale. In negotiations, SBC was also unable to articulate any economic justification or other condition of service for the Business Location Restriction, nor did SBC explain why the Business Location restriction that was unnecessary for its CompleteLink Offering was necessary for other services.

Having received no justification during negotiations, UCS issued the following data request[105] to determine SBC's justification for the restriction:

> Set forth all reasons why SBC contends that a limitation on the number of business locations SBC imposes on certain of its volume-based discount offerings is not an unreasonable restriction on resale pursuant to 47 CFR § 51.605(e), and is not anti-competitive and unreasonable pursuant to sections 13-514 and 9-250 of the PUA, and Identify all Documents that support SBC's position.

SBC refused to answer, claiming that to the extent this information is relevant, it will be provided in SBC's Response and testimony. In light of SBC's refusal to answer, UCS will respond to any SBC contentions in UCS' Supplemental Testimony.

Q: If SBC has not been able to provide any justification of the Business Location Restriction's application to resale, on what basis has SBC rejected UCS' proposal?

A: As discussed in other issues, including the testimony submitted regarding Issue 10, SBC takes the position that its resale offerings need only mirror its retail offerings. Because the Business Location Restriction is included in SBC's retail offerings, SBC believes it must also apply to its resale offerings. Given that position, SBC appears to believe that it is not required to provide any justification for the application of the Business Location Restriction. Instead, SBC believes that UCS' proposal to modify SBC's resale offering to remove the Business Location Restriction inappropriately expands SBC's obligations under Section 251(c) (4) of the Act. As such, SBC characterizes its agreement to remove the Business Location Restriction on its Ameritech CompleteLink Offering as a "voluntary concession" not required by the Act.

Q: What are your thoughts on SBC's "resale need only mirror retail" position?

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[105] UCS Data Request No. 56.

A: SBC's "resale must mirror retail" rationale has been, and continues to be, totally inconsistent with clear FCC precedent. SBC's position that Telecommunications Services "required to be resold under the Act are subject to the same terms and conditions under which they are currently sold at retail"[106] was expressly rejected by the FCC in the *Local Competition Order*. Instead, the FCC concluded that "resale restrictions are presumptively unreasonable" and identified that "[s]uch resale restrictions are not limited to those found in the resale agreement" but also "include conditions and limitations contained in the incumbent LEC's underlying tariff."[107] Further, the FCC stated in paragraph 952 of the *Local Competition Order*:

> We are concerned that conditions that attach to promotions and discounts could be used to avoid the resale obligation to the detriment of competition. Allowing certain incumbent LEC end user restrictions to be made automatically binding on reseller end users could further exacerbate the potential competitive effects.

The FCC codified this principle at 47 CFR § 51.605(e) and placed the burden on the incumbent LEC to justify all resale restrictions with the limited exception of restrictions on cross-class selling and short term promotions.[108]

Because SBC's "resale must mirror retail" argument precluded the parties from having any substantive discussions and negotiations on several issues, UCS attempted, several times, to address the fallacy of SBC's position. SBC, however, ignored UCS, presumably because it had no other argument or justification to offer.

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[106] See SBC Comments to NPRM at 76.

[107] *Local Competition Order*, at ¶ 939.

[108] *Local Competition Order*, at ¶¶ 939, 952; 47 CFR § 51.605(e).

Q: Why does UCS maintain that SBC's Business Location Restriction is an unreasonable restriction on resale?

A: SBC's Business Location Restriction specifically limits UCS' right and ability to aggregate end users in order to meet the high-volume usage requirements of the volume-based discount offerings. The FCC noted in its *Local Competition Order* that "it is presumptively unreasonable for incumbent LECs to require individual reseller end users to comply with incumbent LEC high-volume discount minimum usage requirements, so long as the reseller, in aggregate, under the relevant tariff, meets the minimal level of demand."[109] The Business Location Restriction puts an absolute limit on the number of end users and their locations that may be aggregated under the applicable volume-based discount offerings. The Business Location Restriction specifically limits the number and type of end users to which UCS may market and sell the offering. Furthermore, this restriction may also apply in an even more detrimental manner mid-term during the discount offering commitment if internal growth of the end users attached to such offering bump up against the 250 Business Location Restriction. Thus, because SBC's absolute limit specifically restricts UCS' ability to aggregate end users for the volume-based discount, that restriction is, as provided in the *Local Competition Order*, presumptively unreasonable.

Q: Has SBC's Business Location restriction had an adverse competitive impact on UCS?

A: Yes. Our ability to manage and support customers with many facilities generally distinguishes us from the major carriers. By concentrating on our billing platform, we have

[109] *Local Competition Order*, ¶ 953.

been able to provide innovative billing solutions directly responsive to end user needs and requests to, among other things, consolidate bills among locations and to bill by cost center from a selection of separate business locations. For this reason, our largest target markets have included restaurant chains and franchises, health care and fitness providers with multiple medical facilities and offices, and construction companies with a large number of changing sites. The business locations restriction precludes us from approaching the largest companies within these markets.

Q: Does UCS seek a blanket waiver on all location or end user restrictions?

A: No. we believe UCS' proposal for the Agreement is narrowly tailored and accurately reflects applicable law, including the FCC's rules and decisions on restrictions on resale. UCS' specific proposal for Section 3.1.6 of the Agreement is:

> Except as found to be reasonable and non-discriminatory after review by a Commission in accordance with 47 C.F.R. § 51.613(b), when providing a volume-based Resale Service to CLEC (e.g., CompleteLink) **SBC-4STATE** will not impose on CLEC any limitations on the number of business End Users or locations that may be associated with such volume-based Resale Service.

Issue 15 -- SBC's Save and Winback Promotional Offerings

Q: What are SBC's retail Save and Winback promotional offerings?

A: SBC's Winback promotional offering is a discounted offering available to retail business customers who have transferred their service from SBC to a CLEC or who originally established their service with a CLEC and who now agree to establish service with SBC. SBC's Save offering is a discounted offering available to SBC retail business customers who have received a competitive offer from a CLEC.

Q: Does SBC propose to make these offerings available for resale?

A: Not with respect to the same class of customers. Rather, the Save and Winback discount plans and promotions that SBC proposes to make available for resale by UCS would impose eligibility requirements that constitute discriminatory and unreasonable restrictions on the resale of such Telecommunications Services. Although SBC's design of its various retail Save and Winback offerings varies, based on the specific offering, each offering has threshold "class" eligibility requirements that limit the end users that may be served by such offerings.[110]

Q: Please explain why UCS contends that the restrictions imposed upon its wholesale Save and Winback offerings are discriminatory and unreasonable.

A: SBC's retail Save offerings are in all cases limited to SBC's "existing business customers who have received a competitive offer and are considering switching their business access services to another carrier."[111] SBC's retail Winback offerings have two different eligibility requirements depending upon the specific offering. The first limits SBC's retail Winback offerings to business customers that have left SBC to establish service with another local exchange carrier and now wish to return to SBC.[112] The second limits SBC's retail Winback offerings to business customers that are served by "another

[110] UCS has limited its discussion to the class eligibility requirements of the applicable offerings and has assumed that any geographic or term commitment requirements are applied on a non-discriminatory basis between the retail and analogous resale offerings.

[111] See, for example, Ameritech CompleteLink Select II Save Offer (ILL. C.C. No. 19, Part 2, Section 8, 9th Revised Sheet No. 15). Note that certain Save offerings have non-substantive differences in the eligibility requirements, such as changing the reference to "carrier" to "local exchange carrier".

[112] See, for example, Ameritech SimpleLink Save/Winback (ILL. C.C. No. 19, Part 4, Section 5, 6th Revised Sheet No. 11 through 5th Revised Sheet No. 14), Ameritech CompleteLink A & B Winback (ILL. C.C. No. 19, Part 4, Section 5, 1st Revised Sheet No. 30) and Ameritech CompleteLink Winback (expired promotion) (ILL. C.C. No. 19, Part 2, Section 8, Original Sheet No. 40-41).

competitive local exchange carrier" and now wish to establish service with SBC.[113] When SBC makes available its Save and Winback offerings for resale, however, as *designed* SBC limits the end users to which UCS may resell such offerings and, as *applied* SBC imposes additional and even more limiting restrictions on UCS' resale of such offerings. SBC's actions in this regard violate SBC's obligations under Section 251(c)(4) of the Act and §§13-514 and 9-250 of the PUA for the following reasons: (1) the Save and Winback offerings constitute a class-restriction that precludes UCS from reselling the same Telecommunications Service to the same end user to which SBC may sell such service at retail; (2) SBC can offer its Save and Winback offerings at retail in a greater number of "competitive situations" and to a much larger absolute number of end users than UCS may offer the analogous resale service, (3) the Winback and Save offerings provide SBC with a more competitive retail offering than the resale offering UCS may offer the same end user, (4) SBC imposes both different and additional eligibility restrictions in the resale of the Save and Winback offerings that are not contained in SBC's retail sale of the Save and Winback offerings; and (5) the certification requirements SBC imposes on UCS' resale of Save and Winback offerings are unreasonable and discriminatory.

Q: What is the basis for your contention that SBC's Save and Winback offerings constitute a class-restriction that precludes UCS from reselling the same Telecommunications Service to the same end user to which SBC may sell such service at retail?

[113] See, for example, Ameritech CompleteLink Select II Winback Offer (ILL. C.C. No. 19, Part 2, Section 8, 4th Revised Sheet No. 17.1) and CompleteLink Winback Reloaded Offer (ILL. C.C. No. 19, Part 2, Section 8, 4th Revised Sheet No. 53)

A: SBC's wholesale Save and Winback offerings apply the same eligibility verbiage as their retail counterparts but replace any references to "SBC" as the serving carrier with a reference to "Carrier" (i.e., UCS).[114] The effect of the change in wording is to modify the nature of the Save and/or Winback offering and dramatically change the class of subscribers to which UCS may market the offering.[115] As such, the eligibility conditions contained in SBC's Save and Winback offerings are a class restriction. The FCC has concluded that except as provided in 47 CFR § 51.613(a), cross-class selling restrictions are presumed unreasonable.[116]

Q: Has SBC made any attempt to overcome the FCC's presumption that this particular cross-class selling restriction is unreasonable and discriminatory?

A: Not to our knowledge.

Q: What is the practical effect of the class restriction as designed by SBC on UCS' ability to resell these offerings?

A: The class restriction imposed by SBC on its Save and Winback offerings significantly and unreasonably limits the market to which UCS can resell such offerings. For example, UCS may only use a Save offering with UCS' own existing end user base. Winback

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[114] See, for example, Advice No. IL-03-296, March 18, 2003, CompleteLink Select II Save Offer ("Carrier's eligible customers include Carrier's business customers who have received a competitive offer and are considering switching their business exchange access services to another carrier.") and Advice No. IL-03-354, March 18, 2003, CompleteLink Select II Winback Offer ("Carrier's eligible customers include business customers who have their toll and local network access line(s) with another competitive local exchange carrier within the Ameritech service area and who now wish to establish their toll and local network access line service with Carrier.") Compare the foregoing resale eligibility requirements with the retail eligibility requirements contained in Ameritech CompleteLink Select II Save Offer (ILL. C.C. No. 19, Part 2, Section 8, 9th Revised Sheet No. 15) and Ameritech CompleteLink Select II Winback Offer (ILL. C.C. No. 19, Part 2, Section 8, 4th Revised Sheet No. 17.1).

[115] Ironically, although throughout the negotiations, SBC has steadfastly insisted that its resale obligations under Section 251(c)(4) of the Act require it to only "mirror what it makes available at retail,"; this appears to be the sole exception.

offerings, depending upon which eligibility requirement SBC has imposed on the applicable offering, may only be used when UCS seeks to re-acquire one of the relatively few former UCS end users or, in some cases, the relatively limited class of end users of other CLECs. In comparison, as the incumbent LEC, SBC can offer either a Save or a Winback offering to nearly every single business end user within the SBC service area that purchases a qualifying Telecommunications Services. Save offerings are available to SBC's existing end user base. Winback offerings are available, depending upon which eligibility requirement SBC has imposed on the offering, either to all former SBC end users or all end users currently being served by a carrier other than SBC (which means the entire class of end users who are not already SBC end users). The class restriction is specifically designed to protect SBC's monopoly market share. It (1) precludes UCS from applying the competitive terms[117] of the Save and Winback offerings to the vast majority of the market and (2) allows SBC to use in the vast majority of circumstances its more competitive retail Save and Winback offerings against the less competitive resale pricing terms UCS may offer to the large class of end users that are eligible for SBC's Save or Winback offering, but not eligible for UCS to resell that offering.[118]

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[116] *Local Competition Order* at ¶ 964.

[117] Save and Winback offerings include rates, terms and/or discounts/rewards that ensure such offerings are the most competitive and attractive tariffed offerings from SBC for local access lines and Local and IntraLata Toll Usage. Although the discounts and rates vary based on the particular offering, the rule is that a Winback offering provides more favorable overall rates and/or discounts than a Save offering. For example, the discounts applicable to a 5 year contract on the CompleteLink Select II Winback and CompleteLink Select II Save promotional offerings provide the following one-time reward: Winback: Reward of 10% of the Committed MARC and Save: Reward of 6% of the Committed MARC.

[118] While UCS is not privy to SBC data regarding its precise market share, data recently released by the FCC show that the average ILEC market share in Illinois was 81%. *Local Telephone Competition: Status as of June 30, 2003* (FCC Industry Analysis and Technology Division, Wireline Competition Bureau, December 2003) at p. 11, available at http://www.fcc.gov/wcb/iatd/recent.html. Since SBC is the ILEC in the areas in
(Cont'd)

Q: In what way does SBC's application of the restriction (as opposed to the design of the restriction) further impact UCS' ability to compete?

A: In addition to the fact that SBC's Save and Winback offerings are discriminatory as *designed*, SBC also *applies* different standards and more restrictive proof of eligibility requirements to UCS' resale of such offerings. For example, compare the CompleteLink Select II Save Offer eligibility requirements[119] for an SBC retail end user (received a competitive offer and "*are considering switching*" to another carrier) and a UCS end user (received a competitive offer and "*has contacted you to disconnect their local service*").[120] Even more patently egregious is SBC's CLEC Handbook[121], which provides the following definitions of "Save" and "Winback" *as applicable to resellers* and the respective ordering requirements:

<u>Save</u>

- Definition: Eligible End Users include business End Users who have received a competitive proposal from a *facilities-based provider* and are considering discontinuing their business network access line or business trunk service with the CLEC for the purpose of establishing service with a *facilities-based provider*.[122]

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which the vast majority of Illinois end users are located, it stands to reason that SBC's market share does not depart significantly from the 81% figure reported by the FCC.

[119] See Ameritech CompleteLink Select II Save Offer (ILL. C.C. No. 19, Part 2, Section 8, 9th Revised Sheet No. 16) and Accessible Letter CLECAMO3-032 dated January 31, 2003, (Ordering and Provisioning) Introduction of CompleteLink Select II Save Promotion.

[120] The requirement that a CLEC not be permitted to offer a resale Save offering until its end user has actually accepted another carrier's offer and contacted the losing CLEC is per se unreasonable.

[121] Available at <https://clec.sbc.com/clec/hb/getmenu.cfm>. In response to UCS inquiries, SBC has stated that the eligibility and proof of eligibility requirements contained in the CLEC Handbook do apply to UCS' resale of Save and Winback promotions. SBC also confirmed in its response to UCS' Data Request 48 that the instances when a CLEC may use a resale Save and Winback offering are outlined in the CLEC Handbook on CLEC On-Line.

[122] *Id.* CompleteLink – Retention Save and Winback, Overview, Definitions. (emphasis supplied)

- Proof of Save: The CLEC must maintain proof of the save on file, which consists of the original documentation from another local exchange carrier addressed to the End User. This documentation must include verbiage or other analysis designed to persuade the End User to switch local service providers. The documentation must be in the form of an original letter and must be dated within the run dates of the particular offer. If requested by Ameritech, you must be able to produce proof of the save.[123]

<u>Winback</u>

- Definition: Eligible End Users include business End Users who discontinued their business network access line or business trunk service with the CLEC for the purpose of establishing service with a *facilities-based provider* and now wish to return to that CLEC.[124]

- Proof of Winback: The CLEC must maintain proof of the winback on file, which consists of the original bill the CLEC sent to their End User and a subsequent bill sent to the End User by a competitor. If requested by Ameritech, you must be able to produce proof of the save[sic].[125]

SBC's mandate that the "other carrier" be *facilities-based* for a resale Save or Winback offering clearly imposes an additional requirement that is absent in SBC's retail tariffs.

Q: Has UCS sought through discovery to determine the magnitude of the problem caused by SBC's discriminatory use of "Save" and "Winback" promotions?

A: Yes. SBC refused to disclose how many Save and Winback offerings it has sold to end users, claiming that the information was irrelevant, and also refused to disclose how many of SBC's Save and Winback offerings CLECs have resold to end users, claiming it did not have such information.[126]

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123 *Id.* CompleteLink – Retention Save and Winback, Miscellaneous Ordering Procedures.

124 *Id.* CompleteLink – Retention Save and Winback, Overview, Definitions. (emphasis supplied)

125 CLEC Handbook, CompleteLink – Retention Save and Winback, Miscellaneous Ordering Procedures.

126 UCS Data Request 20.

Q: Has SBC used retail "Save" and "Winback" promotions where the "other carrier" is a non facilities-based carrier such as UCS?

A: Yes. Based on information received from current and former UCS end users,[127] UCS believes SBC has used retail "Save" and "Winback" offerings against UCS—a non facilities-based provider. SBC's retail tariffs and known ordering procedures also appear to not require the same "proof" of eligibility that SBC imposes on CLECs.

Q: Has UCS asked SBC to explain why the retail Save and Winback offerings may be used against non facilities-based carriers, while the wholesale counterparts may not?

A: Yes. SBC has provided no explanation for that difference nor has SBC answered UCS' questions as to the proof of eligibility SBC imposes on its retail customers.[128]

Q: Does UCS object to the proof of eligibility for "Save" requirements that SBC imposes upon resellers?

A: Yes. In addition to being discriminatory, the information requested by SBC as proof of eligibility for "Save" is unreasonable in that it is unduly burdensome on a carrier to request original documentation from its end users in all cases. In many cases, it is a competitive reality that certain carriers will not provide prospective end users with written proposals or offers, because such materials are known to be "shopped" to other carriers to qualify for the lower rates. Instead, most offers are made verbally. If a carrier does provide a written offer to prospective end users, that offer is generally designated confidential and

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[127] For example, the City of Buffalo Grove recently received an aggressive Winback offer. We can offer additional specific, non-privileged examples and documents once UCS' General Objections 6, 7 and 8 to its Data Responses have been addressed ("General Objections").

[128] Certain SBC Distributors have confirmed to UCS that no certification requirements exist for their sale of retail Save and Winback offerings. We can offer specific, non-privileged examples once UCS' General Objections have been addressed.

proprietary, precluding the end user from disclosing or providing the competitive offer to third parties. SBC *always* designates its offers and contracts as confidential and proprietary, thereby precluding its existing and prospective retail end users from providing UCS with the very information demanded by SBC. Given the foregoing, UCS believes SBC's proof of eligibility requirements are an unreasonable restriction on resale.

Q: Did UCS serve any discovery in an attempt to ascertain SBC's reasons for its position on this issue?

A: Yes. UCS served the following data request on SBC:

> Set forth all reasons why SBC contends that the eligibility requirements of SBC's "Save" and "Winback" volume discount offerings are not unreasonable restrictions on resale and an impermissible class restriction pursuant to 47 CFR § 51.605(e), and Identify all Documents that support SBC's position.

SBC refused to answer, claiming that to the extent this information is relevant, it will be provided in SBC's Response and testimony. In light of SBC's refusal to answer, UCS will respond to any SBC contentions in UCS' Supplemental Testimony.

Q: Please summarize UCS' position on this issue and UCS' proposed resolution?

A: SBC's Save and Winback offerings, and SBC's application of such offerings, are an unreasonable and discriminatory restriction on resale in violation of 47 CFR § 51.605(e) and are an anticompetitive, unjust and unreasonable restriction under §§13-514 and 9-250 of the PUA. To resolve this Issue, UCS proposes that the Commission[129]:

[129] Although not specific to this Arbitration Issue, the Commission should also require that SBC not be permitted to restrict its existing and prospective end users from disclosing their contracts and competitive offers to CLECs. Given SBC's current policy of designating all materials and contracts provided to end users as "confidential and proprietary" and placing restrictions on the disclosure of such materials, CLECs are not able to (i) comply with SBC's various proof of eligibility requirements and (ii) review an existing SBC retail contract to determine if it wishes to assume or cancel such contract, including understanding any termination penalties that may apply to such cancellation. This shroud of confidentiality imposed by SBC significantly limits competition and the options available to the end user consumer.

- Adopt UCS' proposed language in Sections 3.1.7, 3.1.7.1 and 3.1.7.2 of the General Terms of the Agreement;

- Require SBC to modify its currently available resale Save and Winback offerings to remove those restrictions on resale that violate 47 CFR § 51.605(e);

- Require SBC to ensure all Save and Winback offerings made available in the future are consistent with 47 CFR § 51.605(e); and

- Require SBC retail to adhere to the same lawful terms and conditions of the Save and Winback offerings that SBC is permitted to impose upon CLECs.

Issue 16 – Access to OSS Information

Q: Please summarize the dispute between UCS and SBC concerning Issue 16 – Nondiscriminatory Access to OSS Information?

A: UCS maintains that the Agreement should require SBC to provide nondiscriminatory access to information concerning Customer Service Records ("CSRs"), ICBs and retail services that is available to SBC's employees and representatives. SBC has not provided UCS its position on UCS' proposed language.[130]

Q: Why does UCS need access to CSRs and ICB information that is at parity with that provided to SBC's employees?

A: The FCC concluded in its *Local Competition Order*, that the provision of access to Operations Support Systems ("OSS") "functions and the information they contain is integral

[130] UCS served a data request on SBC, asking it to "Set forth all reasons why SBC contends that SBC is not required to provide nondiscriminatory access to all information concerning Customer Service Records, ICBs and retail services that is available to SBC's employees and representatives through SBC's OSS, and Identify all Documents that support SBC's position." UCS Data Request 58. SBC refused to answer, claiming that to the extent this information is relevant, it will be provided in SBC's Response and testimony. In light of SBC's refusal to answer, UCS will respond to any SBC contentions in UCS' Supplemental Testimony.

to the ability of competing carriers to enter the local exchange market."[131] The Commission further concluded that "a requesting carrier that lacks access to the incumbent's OSS 'will be severely disadvantaged, if not precluded altogether, from fairly competing.'"[132] Further, the FCC recently confirmed this view and determined that "because these [OSS] systems, databases and personnel are under the exclusive control of the [ILEC] and are necessary for competitors effectively to access network elements, resell [ILEC] services, and interconnect with the [ILEC], we find that [CLECs] are impaired without access to the [ILEC's] OSS."[133]

Moreover, UCS requires access to OSS information regarding termination liability and all information concerning ICBs in order to effectively resell SBC's services in Illinois. For example, as discussed in Issue 6 above, end users often rely upon UCS' examination of the OSS information such as the CSR to determine whether termination liability will be imposed should they switch to UCS. UCS needs access to this termination liability information in order to determine whether it can profitably serve an end user and/or whether that end user is likely to change providers based on its termination liability exposure.

UCS also needs access to the terms of all of SBC's ICBs so that USC can resell these ICBs to New End Users. For example, UCS has reviewed several SBC retail end user bills that indicate the end users are billed in "18/6" increments for Local Usage (i.e., Band A and Band B) with rates that do not correspond to tariff offerings (i.e., the retail end users are being served by ICBs). As noted in our testimony on Issue 1, certain offerings that include

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[131] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 99-238, Third Report and Order, at ¶ 421 (rel. November 5, 1999) ("*UNE Remand Order*"); *Local Competition Order* at ¶ 518 (1996).

[132] *UNE Remand Order*, at ¶ 421, *quoting*, *Local Competition Order*, at ¶¶ 516-516.

18/6 billing appear to be tariffed offerings, while others are ICBs. The OSS information that UCS accesses to review these end users CSRs however provides no reference to the terms and conditions of the ICBs and even more interestingly, UCS has found no USOC or other reference that identifies the 18/6 billing "feature," whether as an element of an ICB or a tariff offering.

Q: To what types of OSS information that is contained in retail, but not wholesale, CSRs (customer service records) does UCS need access?

A: USOC prices, ICB contract terms (including sub-minute increment billing such as 18/6 for Local Usage), and an identification of the contract or promotion signed by the end user and the date signed. For contracts or promotions, we also would need the agreed terms such as any identified promotions that contain a range of MARCs, commitment terms, MADs and corresponding prices and discounts to choose from.

Q: Did SBC ever make this information available to UCS?

A: Yes. Prior to the merger between Ameritech and SBC, the majority of this information was available to UCS. Some time after the merger, SBC, without explanation, stopped making it available to UCS.

Q: How has the FCC defined the OSS that SBC must make available?

A: The FCC broadly defined OSS in the *UNE Remand Order* to include, among other items, the underlying "*up-to-date data*" contained in the ILEC's pre-ordering and ordering systems, databases, and other internal records. Specifically, the FCC defined OSS:

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[133] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 01-338, 96-98, 98-147, FCC 03-36, at ¶ 564 (rel. Aug. 21, 2003) ("UNE TRO Order").

> as consisting of pre-ordering, ordering, provisioning, maintenance and repair and billing functions supported by an incumbent LEC's databases and information. OSS includes the manual, computerized, and automated systems, together with associated business processes and the *up-to-date data maintained in those systems*.[134]

The FCC underscored that "*at a minimum*, incumbent LECs must provide requesting carriers with *the same underlying information* that the incumbent LEC has in any of its own databases or other internal records."[135] The FCC adopted the same broad definition of OSS in its recent UNE TRO Order.[136]

In sum, the FCC concluded that "nondiscriminatory" access to OSS means CLECs must have parity access to the same up-to-date pre-ordering and ordering information regarding UNEs, loop qualification and retail services that is available anywhere in the ILEC's backoffice systems, databases, and other internal records.[137] Federal law thus requires SBC to provide parity access to its OSS and information regarding CSRs, ICBs and retail services.

<u>Issue 17: Exploitation of Termination Charge Inquiry For Marketing</u>

Q: Please summarize the dispute between UCS and SBC concerning Issue 17 – Exploitation of Termination Charge Inquiry For Marketing?

A: The parties disagree as to whether SBC's retail organization should be able to exploit a request by UCS for a calculation of termination charges on behalf of an end user by using

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134 *UNE Remand Order*, at ¶ 425 (emphasis added); 47 C.F.R. § 319(g). *See also Local Competition Order*, at ¶¶ 517-518.

135 *UNE Remand Order*, at ¶ 427 (emphasis added).

136 UNE TRO Order, at ¶ 561-562 ("We adopt again the same definition of OSS as in our prior orders").

137 UNE TRO Order, at ¶ 561 ("OSS includes manual, computerized, and automated systems, together with associated business processes and the data maintained and kept current in those systems.").

the request to contact that end user and engage in "save," "winback" and other sales and marketing efforts with respect to that end user.[138] UCS raised this issue because on a number of occasions after UCS requested SBC to calculate termination charges for an existing SBC retail end user, an SBC retail representative contacted each of the end users shortly after UCS' request and engaged in aggressive marketing efforts to convince the end user to remain with SBC. UCS has submitted the statement of Mr. Widmer to corroborate that SBC engages in such improper contacts.[139]

UCS believes that SBC's actions in this regard are unreasonable and anticompetitive and violate Section 222(b) of the Act. UCS believes that SBC's retail organization should be precluded from engaging in save and/or winback activities that are triggered by a CLEC request for termination penalty calculations. UCS has proposed language in the agreement that would prohibit such actions. SBC has not agreed to UCS' proposed language.

Q: Why does UCS contact SBC for a calculation of termination penalties and what obligation does SBC have to provide such calculation?

A: In Docket No. 00-0024, the Commission determined that termination charges then being imposed by SBC for the services subject to the *Termination Liability Order*[140] were

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[138] Our reference to "save" and "winback" is a reference to SBC's marketing efforts to keep its end user, not the provision of "Save" and "Winback" offerings per se; UCS is aware, however, that SBC's marketing efforts in this regard will include the offer of those offerings as well as ICBs.

[139] Statement of Lawrence F. Widmer, Jr., at 4-5, UCS Exhibit 12 ("A number of municipalities under existing contracts with SBC were contacted shortly after requests for termination penalties were made."). Several other UCS end users possessed evidence regarding SBC's misuse of termination liability requests for marketing purposes, however, they were unwilling to submit testimony in this proceeding for fear of retaliation by SBC. In any event, given that SBC's position is that it should be entitled to contact the end users as a result of UCS' request of termination liability, the Commission should presume such contacts do occur and are not isolated instances.

[140] *Association of Communications Enterprises f/k/a Telecommunications Resellers Association v. Ameritech Illinois, Inc., Complaint against enforcement of unjust and anti-competitive termination penalties in tariffs and contracts for Value-Link service and for modification of Value-Link tariffs and contracts*, Docket No. (Cont'd)

"unjust", unreasonable," and "anti-competitive," "void as a penalty,"[141] and violated sections 13-514 and 9-250 of the PUA.[142] Further, the Commission directed SBC to provide pursuant to a Commission prescribed formula, within three business days, a calculation of all applicable termination charge for the services subject to the *Termination Liability Order,* upon termination of service by the end user or upon an oral or written request by an end user or agent of the end user.[143]

Q: Do end users frequently request that UCS (or one of UCS' distributors) contact SBC to determine the termination penalties that will apply if the end user decides to terminate its service with SBC and switch to UCS?

A: Yes. End users will generally request that UCS (or one of UCS' distributors) contact SBC to determine the termination penalties that will apply if the end user decides to terminate its service with SBC and switch to UCS. End users request that UCS perform this task for a number of reasons. First, most end users need to know the termination penalties SBC will impose if it switches its local service provider. Because of the complexity of SBC's retail contracts, SBC's retail end users are often uncertain as to the amount of any potential termination liability that they may bear. End users rely on UCS' (and/or its distributors') expertise to determine the liability and to ensure the liability quoted is consistent with the end user's contract. In the case of services subject to the *Termination*

00-0024, Order on Rehearing, at 18 (Feb. 20, 2002) ("*Termination Liability Order*"). The services identified in the *Termination Liability Order* include ValueLink, ValueLink Extra, ValueLink Extra Select, ValueLink Illinois Option F, ValueLink Illinois Option F Preferred, Enhanced Ameritech ValueLink Plus, Straight Rate, and CompleteLink.

[141] *Termination Liability Order* at 17-18, 24, 35 (see ordering paragraphs 5, 7, and 8)

[142] 220 ILCS 5/13-514, 5/9-250.

[143] *Termination Liability Order*, at 29, 36.

Liability Order, that need for expertise is even greater, because the termination penalties for such services are not discernible on the face of the end user contracts.

Q: Why are the termination penalties for such services not discernible on the face of the end user contracts?

A: The termination penalties for such services are not discernible on the face of the end user contracts because after finding SBC's termination penalties "unjust," "unreasonable," and "anti-competitive," and "void as a penalty,"[144] the Commission modified the termination penalties. SBC is required to accommodate inquiries for calculation of the termination penalties consistent with the Commission's decision in the *Termination Liability Order*. Because most end users are not knowledgeable about the Commission's decision and the appropriate measure of termination penalties, they again rely on the expertise of UCS to request the calculation of termination penalties and to verify that SBC's calculation is consistent with the Commission's formula prescribed by the *Termination Liability Order*.

Q: Does UCS prefer to contact SBC about termination penalties, rather than telling the end users that they must do so themselves?

A: Yes. UCS prefers to contact SBC for a calculation of termination penalties for a number for reasons. First, UCS believes it appropriate to provide this service to its prospective end users. If UCS is to convince an end user to switch local service providers, UCS need not only convince that end user that UCS is the right carrier for the end user but must also make the process as simple as possible for that end user. As noted above, end users look at their telecommunications provider as a one-stop shopping experience, requiring

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[144] *Termination Liability Order* at 17-18, 24, 35 (see ordering paragraphs 5, 7, and 8).

a carrier to advise the end user about all issues relative to that end user's service (after receiving appropriate letter of agency). Based on UCS' experience, the majority of end users are only willing to consider a switch in local service providers if the CLEC can make such a switch as simple a process as possible for the end user. A CLEC has a high probability of convincing an end user to at least listen and/or consider the CLEC's proposal if the CLEC need only minimally involve that end user in the process to prepare the proposal (e.g., by providing certain information on its existing service or its needs). If, however, the end user is required to devote significant time and resources to gather information for the CLEC so that the CLEC can then prepare the proposal, the CLEC is generally left with an unwilling prospect.

Another reason UCS prefers to handle the inquiry to SBC is that when an end user contacts SBC for a termination penalty calculation, SBC attempts to retain that end user. It obviously makes it very difficult to close a sale to an end user if as part of your pitch process you require that end user to contact its existing provider and present an opportunity for that provider to engage in a one-to-one save discussion.

Q: Please explain the nature of what you believe have been inappropriate contacts by SBC's retail sales or account management organization?

A: SBC has implemented the Commission's directive to provide a calculation of termination liability for the covered services by identifying SBC's Contract Management Group as a point of contact for an end user and/or their agent's inquiries. The Contract Management Group falls within SBC's retail operations and is generally responsible to implement all SBC contracts and act as a repository for copies of those contracts.

Statements of end users submitted contemporaneously with this statement confirm SBC's misuse of UCS' request of a termination liability calculation. For example, the statement of Mr. Widmer indicates that many municipalities that "had not been contacted directly by SBC for years, if at all" were suddenly contacted by SBC soon after a request for a termination liability calculation was submitted on their behalf. After the request for termination liability calculation, SBC contacted these municipalities and began making aggressive offers to retain their business.[145]

Based on the timing and nature of SBC's contacts with end users, UCS believes that SBC has implemented a lead generation program that provides SBC's retail sales and/or account management representatives with the names of end users that are considering switching local service providers from SBC. SBC then takes this lead and contacts the end user to convince that end user to stay with SBC. If true, UCS believes it ironic that a procedure intended to redress anti-competitive conduct by SBC and facilitate competition is now being exploited by SBC to frustrate competition.

Q: Did UCS ask SBC whether it has in place a lead generation program or had ever attempted to implement a lead generation program?

A: UCS has not been able to determine the degree to which SBC has implemented, endorses or permits "termination liability lead generation." UCS submitted a Document Request[146] asking SBC to:

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[145] USC Exhibit 12, Statement of Widmer, at 4-5.

[146] UCS Document Request 60.

> Produce copies of all Documents exchanged between the group or unit that receives or has received termination penalty calculation inquiries and the retail sales group and/or account management.

SBC refused to provide any documents or information responsive to UCS' request in this regard, alleging that the request was overly broad, burdensome and was not relevant.

In light of SBC's refusal to provide this information, and its continued statements during negotiations that SBC can rightfully contact its end users when a CLEC or its agent requests a termination liability calculation, it would be appropriate for the Commission to presume that SBC does have in place a lead generation program to engage in retention efforts upon the receipt of a CLEC (or its agent's) request for a termination penalty calculation.

Regardless of the degree to which the improper lead generation occurs, any occurrence still violates federal law and is anticompetitive under Illinois law. And, if SBC does not have in place a formal or informal lead generation process to engage in the above-described marketing efforts, then the inclusion of UCS' proposed language will be harmless. Its presence will, however, ensure that SBC does not attempt to implement such a program in the future.

Q: Why does UCS believe that SBC does not have the right under federal law to use a termination penalty inquiry to engage in "save" or "winback" marketing efforts with its end users?

A: When a CLEC submits an inquiry to SBC about an end-user's termination penalties, federal law strictly prohibits SBC from triggering a retention marketing effort as a result of the inquiry. In particular, the FCC has held that "where a carrier exploits advance notice of a customer change by virtue of its status as the underlying network-facilities or service provider to market to that customer, it does so in violation of section 222(b)" of the Act.[147] In rendering this ruling, the FCC stated that Section 222 of the Act:

> does not allow carriers to use [Customer Proprietary Network Information] CPNI to retain soon to be former customers where the carrier gained notice of a customer's imminent cancellation of service though the provision of carrier-to-carrier service. We concluded that competition is harmed if any carrier uses carrier-to-carrier information … to trigger retention marketing campaigns, and consequently prohibit such actions accordingly.

In this case, the "information" is UCS' inquiry to SBC regarding an end user's termination liabilities. Therefore, pursuant to federal law and FCC rulings, SBC cannot lawfully trigger a marketing effort as a result of obtaining this information.

Q: What is UCS' proposal on this issue?

A: UCS has proposed language in Section 3.1.10.2 of the Agreement that would (1) deem any request by a "Requesting Party"[148] for a calculation of contract termination liability for an SBC end user to be the confidential information of the Requesting Party, (2) restrict SBC's Contract Management Group from disclosing to SBC's retail sales or account management organization that the Requesting Party requested a calculation for an end user and (3) not allow SBC's retail business unit to contact the end user for which termination liability is requested to engage in "save," "winback" or "retention" discussions.

Q: What was SBC's response to UCS' proposal?

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[147] *Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information; and Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934; as amended*, Order on Reconsideration and Petitions for Forbearance, 14 FCC Rcd. 14409, 14450, ¶¶ 78-79 (1999).

[148] UCS defines a "Requesting Party" in its proposed Section 3.1.10.1 of the Agreement as "CLEC or its agent."

A: SBC maintains that because the request for a calculation of termination liability is directed to the Contract Management Group, which falls under SBC's retail organization, SBC's retail organization may freely use that information.

Issue 18 – Access To Termination Liability Information In SBC's OSS

Q: Please summarize the dispute between UCS and SBC concerning Issue 18 – Access To Termination Liability Information In SBC's OSS?

A: The parties' dispute on Issue 18 is based on two separate but related requests by UCS. First, as noted in UCS' testimony in Issue 17, the Commission, on its own initiative, directed SBC to provide, pursuant to a Commission prescribed formula, within three business days, a calculation of all applicable termination charges for services subject to the *Termination Liability Order*, upon termination of service by the end user or upon an oral or written request by an end user or its agent.[149] Because SBC's compliance with the *Termination Liability Order* has lapsed from time to time since the Commission released its order, UCS has proposed language that requires SBC to comply with the *Termination Liability Order*.

Second, because UCS believes SBC, as the incumbent LEC, enjoys an unfair, unreasonable and anti-competitive advantage over CLECs by fielding end user inquiries for calculation of termination liabilities not covered by the *Termination Liability Order* and then engaging in aggressive marketing efforts to retain that end user, UCS has also requested that SBC make available to UCS or UCS' agent termination penalty calculations for all retail services provided by SBC and its affiliates for which they may impose termination liability

[149] *Termination Liability Order*, at 29, 35-36 (ordering paragraphs 5, 9-10).

upon an SBC end user (provided, of course, the end user has authorized the disclosure). SBC has rejected UCS' proposals outright.

Q: Why does UCS believe it necessary to include in the Agreement an obligation for SBC to comply with the Commission's *Termination Liability Order*?

A: Notwithstanding the binding nature of the *Termination Liability Order*, there have been several instances when SBC has failed to comply with the three business day timeframe required by the *Termination Liability Order* and other instances in which SBC has wholly suspended its compliance with the order. In fact, at one time an SBC representative even stated to UCS that SBC was no longer required to process UCS' requests for termination liability calculations because "SBC had re-evaluated its obligations under the order." Unfortunately, UCS cannot name the specific SBC representative that made such statement and SBC has refused to answer SBC's discovery requests that would confirm this re-evaluation.

Regardless, it is imperative that UCS receive termination liability information on a timely basis as its delay significantly impairs UCS' ability to market to existing SBC retail end users. Accordingly, to preclude SBC from improperly suspending or delaying its performance under the *Termination Liability Order*, UCS believes it appropriate to include SBC's compliance with that order as a covenant in the Agreement.

Q: What happens if the *Termination Liability Order* is modified and/or the Commission determines that SBC is no longer required to provide termination liability calculations consistent with the order?

A: The provisions proposed by UCS to be included in the Agreement address any subsequent change to SBC's obligations under the *Termination Liability Order*. First, the

Change of Law provisions proposed by UCS at Section 13.1 of the Agreement address any modification, reversal or other action that affects the *Termination Liability Order*. The affected party need only provide notice of the "Change of Law" and the parties would be obligated to negotiate an amendment to the Agreement consistent with that "Change of Law". Furthermore, UCS' proposed clause (i) of Section 3.1.10.1 of the Agreement accommodates any expansion, contraction or suspension of services that are subject to the *Termination Liability Order.*

Q: What is UCS' proposal with respect to services not covered by the *Termination Liability Order*?

A: UCS proposes that SBC be required to provide, within three business days of an end user or its agent's request, termination charge calculations and their basis for other retail services not addressed in the *Termination Liability Order* that are provided by SBC to that end user. UCS makes this request because UCS' experience in the marketplace is that an end user's inquiry into its applicable termination charges impose a significant competitive hurdle for CLECs.

First, it is obviously necessary that prior to switching carriers, an end user must know the termination penalties it will incur if it switches its local service provider. Because of the complexity of SBC's retail contracts, SBC's retail end users are often uncertain as to their potential termination liability. UCS has found that SBC's current retail end users often ask UCS for information as to their termination liability to SBC should they switch their service from SBC to UCS. UCS is, however, unable to respond to an end user's request because of SBC's practice of requiring end users to afford proprietary treatment to their contracts. The SBC end user is precluded from disclosing to UCS its contract and SBC refuses to respond to

UCS inquiries for termination liability on services not covered by the *Termination Liability Order*, notwithstanding that UCS can produce end user authorization to request such information on behalf of the end user. If the end user itself contacts SBC about its termination liability, SBC uses that end user inquiry to engage in aggressive save and retention efforts.

The result of SBC's policies on termination liabilities not covered by the *Termination Liability Order* (ignoring the improper lead generation discussed in Issue 17) is to greatly inhibit a CLEC's marketing and sale efforts and to preserve SBC's market share by furnishing SBC with an automatic "save" opportunity each time an SBC retail end user contacts SBC to determine its termination liability. UCS believes this result is anti-competitive and unreasonable.

Q: In addition to UCS' belief that SBC's failure to provide a CLEC termination liability calculation is anticompetitive and unreasonable, on what other basis does UCS request such information?

A: To the extent termination liability information exists within any of SBC's OSS, SBC is required "at a minimum" to provide "parity" access to *"the same underlying information* that [SBC] has in any of its own databases or other internal records."[150] In fact, the FCC has broadly defined OSS such that it likely includes this termination liability information. Specifically, the FCC defined OSS as:

> consisting of pre-ordering, ordering, provisioning, maintenance and repair and billing functions supported by an incumbent LEC's databases and information. OSS includes the manual, computerized, and automated systems, together with

[150] *UNE Remand Order*, at ¶ 427 (emphasis added).

> associated business processes and the *up-to-date data maintained in those systems*.[151]

SBC is thus clearly required under existing federal law to provide UCS with access to all information regarding termination liability that exists in any of SBC's databases, information systems, records, business processes and the up-to-date data maintained in those manual and automated systems.

Since SBC has not provided UCS the means to access this information via its OSS, UCS has requested that SBC field UCS' inquiries for such information in a manner similar to that required by the Commission in the Termination Liability Order and subject to the same protections against lead generation marketing proposed by UCS in Section 3.1.10.2 of the Agreement.

Q: What is SBC's position on this issue?

A: SBC has stated that it will provide termination liability calculations for only those services expressly set forth in the Commission's *Termination Liability Order*, and not for services that SBC maintains are not covered by that Order. SBC has not responded to UCS' discovery requests on this issue,[152] so we do not know why SBC does not believe it is required to provide UCS access to termination liability information in its OSS or why it is not reasonable for SBC to provide UCS that information if the SBC retail end user has authorized UCS to obtain such information on its behalf. In light of SBC's refusal to answer, UCS will respond to any SBC contentions in UCS' Supplemental Testimony.

<u>Arbitration Issue 19 – Term of the Agreement</u>

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[151] *UNE Remand Order*, at ¶ 425 (emphasis added); 47 C.F.R. § 319(g). *See also Local Competition Order*, at ¶¶ 517-518.

[152] See UCS Document Request 60.

Q: What is at issue in Issue 19 – Term of the Agreement.

A: UCS seeks a three-year agreement, whereas SBC proposes to limit the agreement to one year.

Q: Why does UCS seek a three-year agreement?

A: UCS is a small competitor in this market. UCS maintains that the term of the Parties' Agreement should be three years from the date of Commission approval in order to avoid imposing the burden and expense of nearly continuous negotiations.

Q: If a one-year agreement were signed, when would new negotiations begin?

A: Section 252 of the Act envisions that negotiation of a successor Agreement will take approximately 160 calendar days to complete. Thus, if the term of the Agreement were only one year as proposed by SBC, then UCS and other small market participants would be forced to bear the expense of negotiating a minimum of at least 160 days out of the year. If arbitration becomes necessary, the fraction of the year devoted to adoption of a new agreement would be enlarged considerably.

Q: How long have the parties been negotiating regarding this Agreement?

A: UCS sent a request for negotiation on May 13, 2003, which means the statutory period for initiation of arbitration would have expired on October 20, 2003. The "arbitration window" was extended several times in an effort to reach a negotiated agreement. The ruling date is therefore not until April 26, 2004. This means that the negotiation/arbitration will take nearly a year—the same duration SBC proposes for the Agreement.

Q: You've discussed the burden on UCS, but wouldn't both parties presumably benefit from having a longer term Agreement?

A: Yes. The cost of negotiations and arbitration is, of course, proportionately higher for a small company such as UCS, but that does not mean it is without cost for SBC. SBC has expended not only in-house legal and business resources but also, at least for the arbitration, has hired outside counsel. Presumably, both parties would benefit from a multi-year interregnum between negotiations.

Q: Isn't it more likely that there will be a change of law during the effective period of a three-year agreement as opposed to a one-year agreement?

A: Yes, it is, but changes in the law affect both parties. Furthermore, there is a change of law provision in the Agreement (General Terms and Conditions, Section 13.1), which should provide both parties protection from changes in the law. The parties can (and have) structured an Agreement that minimizes the uncertainty of an intervening change of law.

<u>Issue 20 – Term of Service Agreements</u>

Q: Please summarize the dispute between UCS and SBC concerning Issue 20 –Term of Service Agreements?

A: The parties disagree as to whether a Service Agreement executed during the term of the Agreement should remain in effect for its stated term or should expire or terminate on the same day as the Agreement expires or terminates. UCS believes that if during the term of the Agreement it enters into a Service Agreement, that Service Agreement should continue to remain in effect for the stated term of that Service Agreement. For example, if UCS purchases Resale Services with a 5 year volume and term commitment that is evidenced by a Service Agreement, that Service Agreement, and the rates, terms and conditions contained in that Service Agreement, should continue in effect for the stated term of 5 years. SBC has taken the position that any Service Agreements entered into by the parties during the term of the Agreement must terminate upon the termination or expiration of the Agreement, but has failed to provide UCS with a rationale for this position.

Q: What is the typical term of a Service Agreement?

A: The term of Service Agreements vary based on the specific service purchased. Currently, SBC offers Service Agreements with a term of one to five years (depending on the service and plan). Based on the design of SBC's offerings, a CLEC is able to receive a lower rate and/or higher discount based on a longer commitment. For example, on the Ameritech CompleteLink Offering, if a CLEC commits to the highest MARC available on that offering, that CLEC's MARC Volume Discount for a 1, 3 and 5 year commitment will be 10%, 12% and 12.5% respectively.[153] On dedicated DS1 Service, irrespective of Channel Mileage and assuming two points of termination, the monthly recurring rate for an Access Area C circuit is $216.64 with no term commitment (i.e., month-to-month); $200.54 with a twelve month commitment; $188.00 with a twenty-four month commitment; $167.47 with a thirty-six month commitment and $137.12 with a sixty month commitment.[154] Accordingly, to receive the most competitive rate, UCS must be willing to provide SBC a multi-year commitment that is embodied in a Service Agreement.

Q: Why does UCS believe Service Agreements should continue past the expiration or termination of the Agreement?

A: There are a number of reasons for UCS' position. First, UCS should be permitted to purchase all services that are available for resale. If SBC's position were adopted, UCS could never purchase a term offering that had a term longer than the remaining term of the

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[153] ILL. C.C. No. 20, Part 22, Section 23, 6th Revised Sheet No. 55.

[154] ILL. C.C. No. 20, Part 22, Section 35, 3rd Revised Sheet No. 65.

Agreement. Because the most heavily discounted services require the longest term commitments, UCS would be precluded from purchasing the lower priced services associated with multi-year commitments. Instead, under SBC's proposal, UCS would be forced to accept the higher rates associated with shorter term commitment services. Taken to its logical extreme, within one year of the expiration date of the Agreement, UCS would be forced to purchase only month-to-month services.[155] SBC's proposal imposes an unreasonable restriction on the Resale Services UCS can purchase under the Agreement and would paralyze UCS' efforts to compete with SBC.

A second reason that Service Agreements should continue for their full term is that UCS should be entitled to receive the full benefit of its bargain after purchasing an offering that requires a volume, revenue or term commitment. If UCS contractually commits to guarantee SBC a certain revenue stream over a defined period, UCS should be entitled to receive the full benefit of services associated with that guarantee of purchase.

Finally, as discussed in UCS' testimony submitted on Issue 31, SBC appears to honor the full term of its retail end user contracts and UCS is entitled to the same treatment. For example, in what appears to be a standard term in SBC's Master Discount Agreement, SBC structured the "umbrella" Master Discount Agreement to have a term that remains "in full force and effect for as long as there is an Attachment remaining in effect under this Agreement."[156] This fact is especially relevant as the structure of SBC's Master Discount Agreement and the Attachments executed thereunder that evidence "the Customer's

[155] Notably, SBC advocates that the term of the Agreement be one year, so after the first day, UCS would be relegated to ordering service on a month-to-month basis.

[156] See redacted Section 1(A) of the Master Discount Agreement ("MDA"), attached as UCS Exhibit 13.

commitment to purchase the services and products covered by that Attachment"[157] is analogous to the Agreement and the various Service Agreements UCS will execute to evidence its commitment to purchase Resale Services. Although the term of each Service Agreement should be honored as a stand-alone agreement regardless of how SBC treats its retail end users, the fact that SBC does treat its retail end users in the same manner as UCS currently proposes is an additional reason why UCS' proposal should be adopted.

Q: What is SBC's rationale for not allowing the Service Agreements to continue past the expiration or termination of the Agreement?

A: SBC has not provided UCS any rationale for its position. The only position SBC has espoused is that the Resale Services purchased through a Service Agreement would convert to the rates, terms and conditions of the Resale Tariff upon the expiration or termination of the Agreement. UCS issued the following data request[158] to determine SBC's rationale for its position:

> Set forth all reasons why SBC contends that the term of a Service Agreement executed during the term of the parties' interconnection agreement should automatically terminate with the interconnection agreement and Identify all Documents that support SBC's position.

SBC refused to answer, claiming that to the extent this information is relevant, it will be provided in SBC's Response and testimony. In light of SBC's refusal to answer, UCS will respond to any SBC contentions in UCS' Supplemental Testimony.

Q: Has SBC limited the term of other CLECs' Service Agreements in the same manner as SBC currently seeks to limit UCS?

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157 *Id.* at Scope of Agreement.

158 UCS Discovery Request 61.

A: We don't know. UCS served discovery on SBC to ascertain the answer to this question, but SBC refused to answer.

Q: Under SBC's position, what happens if the rates, terms and conditions contained in the Service Agreement differ from the rates, terms and conditions available under the Resale Tariff at the time the Agreement expires or terminates?

A: As noted above, SBC has not explained its position, including both the underlying rationale for that position or the mechanics as to how SBC intends to implement its position if it were to prevail in arbitration. Regardless, even absent an explanation from SBC, we believe SBC's proposed position is unworkable and unreasonable, intended to deprive UCS of the benefit of its bargain when purchasing term commitment Resale Services. SBC has already agreed to rates, terms and conditions in the Agreement that will vary, in some cases significantly, from the Resale Tariff. For example, in the Appendix Resale, in what are agreed upon provisions, SBC has agreed that notwithstanding anything to the contrary contained in a Resale Tariff, a Resale Notification or a CompleteLink Agreement, SBC's provision of CompleteLink Services to UCS will allow UCS to (1) subscribe to multiple CompleteLink Service offerings, (2) satisfy its MARC by aggregating multiple end user customers, (3) exceed the "Business Location Restriction" contained in the Resale Tariff and CompleteLink Agreement, (4) exceed the MAD and (5) receive an "Additional Discount" on top of the normal MARC Volume Discount.[159] UCS' purchase of CompleteLink Services during the term of the Agreement will be subject to the terms of the Appendix Resale and will, based on the foregoing, have rates, terms and conditions associated with such purchase

[159] Section 2.2 of Appendix Resale.

that are different than those contained in the Resale Tariff. If mid-term of the Service Agreement, a different set of rates, terms and conditions applied to ongoing Resale Services purchased by UCS and provided by UCS to its end users, UCS would likely be economically disadvantaged and immediately in technical breach of the Resale Tariff. To "unwind" UCS' provision of Resale Services consistent with the Service Agreement to comply with the different terms of the Resale Tariff would severely disadvantage UCS and its end users.

SBC's position also provides SBC the unilateral right to modify the rates, terms and conditions of a UCS commitment to purchase Resale Services. Because SBC has the ability to unilaterally modify its Resale Tariff, SBC could institute revisions to its tariff that, had UCS known such provisions would apply to UCS' Resale Services, UCS may not have purchased the term Resale Services. Thus, SBC's proposal requires UCS to incur significant risk by requiring UCS to guarantee the purchase of Resale Services over a prescribed term even though UCS will not know the rates, terms and conditions that will apply to such Resale Services and SBC will have the unilateral right to control and modify those rates, terms and conditions.

<u>Issue 21 – Liability For Failure To Block Alternate Billing Service</u>

Q: Please summarize the dispute between UCS and SBC with respect to Issue 21, liability for failure to block alternate billing service?

A: While SBC and UCS have agreed that SBC should in general be immune from liability for fraud associated with the account of a UCS end user, this issue concerns a narrow exception to that immunity that UCS has proposed. UCS proposes that SBC not be immune from liability for consumer fraud where that fraud was made possible by SBC's failure to implement blocking of Alternate Billing Service ("ABS") that was ordered by UCS properly on a given end user account. SBC seeks such an absolute immunity from liability, even where SBC's failure to implement UCS' order for blocking of ABS properly made the fraud possible.

Q: Does UCS contend that SBC should always be liable for consumer fraud if it fails to implement ABS blocking ordered by UCS properly?

A: No. UCS simply seeks to remove SBC's immunity. SBC's liability, if any, would still be left open for case-specific determination.

Q: Why does UCS believe that SBC should not be immune from liability for consumer fraud in cases in which its failure to implement UCS' order for ABS blocking properly made the fraud possible?

A: UCS views this as a simple application of conventional legal principles of causation. If SBC's breach of its contractual duty constituted the proximate cause of the injury, SBC should bear proportionate responsibility. Placing such responsibility on SBC, which has the ability to prevent the loss, makes more sense than placing the responsibility on UCS, which is powerless to avoid the loss.

Q: Has SBC explained why it believes it should be immune from liability?

A: Yes. SBC has contended that properly implemented ABS blocking does not always preclude all consumer fraud.

Q: Is there any validity to SBC's contention?

A: Leaving aside the question of whether properly implemented ABS blocking does or does not prevent *all* consumer fraud, there is no debate over the fact that properly implemented ABS blocking prevents *some* consumer fraud. The question of whether properly implemented ABS blocking would have prevented the fraud in any particular instance should be left for a case-by-case inquiry. This is analogous, for example, to a party's failure to wear a seat belt in an automobile accident. Such a failure may in some cases be causative of an injury, but in other cases (for example, a head-on crash in which both cars are traveling 80 miles per hour) may not be causative. UCS simply wants to be permitted to show that SBC's failure to implement ABS blocking was sufficiently causative of the fraud to warrant the imposition of partial or total liability on SBC.

Q: Did UCS seek discovery on the success and/or failure on ABS and to better understand SBC's position on this issue?

A: Yes. UCS issued the following data request[160] to SBC:

> Set forth all reasons why SBC contends that SBC should be exempted from liability when consumer fraud occurs, in situations where SBC has failed to implement Alternate Billing Service ("ABS") that was ordered by UCS on a given end user account and Identify all Documents that support SBC's position.

SBC refused to answer, claiming that to the extent this information is relevant, it will be provided in SBC's Response and testimony. In light of SBC's refusal to answer, UCS will respond to any SBC contentions in UCS' Supplemental Testimony.

SBC also requested documents[161] relating to the success or failure of ABS and any credits granted to a retail end user or CLEC for any fraud not detected by ABS but SBC also refused to respond to those requests. In light of SBC's refusal to provide this information, it would be appropriate for the Commission to presume that SBC has provided credits for any fraud not detected by ABS.

<u>Issue 22 – Billing Disputes</u>

[160] UCS Discovery Request 62.

[161] UCS Document Requests 69 and 70.

Q: Please set forth the disagreement in Issue 22 – Billing Disputes

A: The parties disagree on the amount of time each should have to dispute billing charges. SBC seeks to limit UCS to 29 days to dispute billing mistakes while providing itself a full year to do so. UCS believes the timeframe in which the parties may dispute charges should be the same for both.

Q: Describe UCS' position on the billing issue.

A: SBC's bills are long, complex and often contain errors. SBC's billing errors could involve over-billing of charges, which would favor SBC and once identified and documented would likely be disputed by UCS, or under-billing of charges, which would favor UCS and would likely be backbilled by SBC. Regardless of the party the error favors, UCS believes both should have the same window of time in which to document and challenge billing errors. UCS proposes that both parties have a 12-month window in which to challenge billing errors. Further, SBC should be required to provide similar detailed information in support of its backbilling of under-billed charges that it demands from UCS in section 6.4.1 for disputes involving over-billed charges.

Q: What is SBC's position on this issue?

A: Notwithstanding its poor billing performance, SBC insists in section 6.4.1 of the Agreement that UCS provide it with detailed information supporting any billing dispute within 29 calendar days of the bill due date. According to SBC's proposed language, failure to provide such detailed information within 29 days shall constitute UCS' "irrevocable and full waiver of its right to dispute the subject charges." Effectively, SBC seeks to impose an absolute 29-day limit on UCS' right to dispute over-billed charges and insists that UCS provide not just notice of the billing dispute but also detailed information supporting its dispute within the same 29 days. On the other hand, SBC places no limit on its ability to backbill UCS for any un-billed or under-billed charges.

Q: Have there been billing disputes in the past?

A: Yes. There have been significant billing disputes. These disputes are outlined in our discussion of Issues 7 and 23.

Q: Is the problem typically one of underbilling or overbilling?

A: The errors overwhelmingly run in SBC's favor.

Q: Who generates the bills?

A: SBC.

Q: So SBC has the initial responsibility to ensure they are accurate?

A: Yes.

Q: What incentive does SBC have to bill properly if UCS has only 29 days in which to challenge a bill?

A: SBC has absolutely no incentive to ensure its bills are accurate when they are issued because UCS waives any overcharges that it cannot detect and document within 29 days. SBC, on the other hand, can backbill under-billed charges at its leisure. In fact, SBC's one-sided proposal provides SBC with a perverse incentive to obtain a windfall by consistently overbilling charges and defying UCS to identify and document all of the overbilling on SBC's extraordinarily complex, lengthy, and regularly inaccurate bills within a mere twenty-nine days or forfeit all right to challenge the overbilled amounts.

Q: Why should SBC and UCS have different deadlines, as SBC proposes, for challenging billing errors?

A: There is no logical reason why UCS should be required to identify and document over-billed charges resulting from SBC billing errors within 29 days, whereas SBC has no limit on the time it has to identify and collect unbilled or under-billed charges. UCS' proposal, on the other hand, provides a reasonable opportunity for UCS to receive any billing inquiries or disputes from its end users, investigate those claims and, if warranted, promptly submit a claim to SBC. Given the impracticality of disputing all charges within 29 days of the bill due date, it is unreasonable and too severe a penalty for UCS to waive its billing dispute rights irrevocably.

Q: How does UCS propose the Commission resolve the issue?

A: The Commission should direct the Parties to incorporate into the Agreement UCS' proposed Section 6.1.3 of the Agreement and delete SBC's proposed language in Section 6.4.1 of the Agreement. UCS' proposed language will provide each party 12 months to challenge bills. In contrast to SBC's unreasonable position, UCS' proposed language provides both Parties with a symmetrical right to submit claims with respect to the accuracy of SBC's billings within twelve months. UCS' proposal places an equal burden on both Parties to detect and document SBC's billing errors.

<u>Issue 23 – Audits</u>

Q: Please summarize the dispute between UCS and SBC concerning Issue 23 -- Audits

A: While the parties have agreed as to most of the provisions governing audits, they disagree as to the extent to which a party that performs an audit should be reimbursed for the cost of conducting an audit if such audit has found an overcharge of more than 5% in favor of the party being audited (the "Audited Party"). The parties have agreed that the party conducting the audit (the "Auditing Party") may use in-house auditors to conduct the audit unless the Audited Party requires the Auditing Party to engage an independent auditor to conduct such audit. The parties have agreed that if the Audited Party requires the Auditing Party to retain an independent auditor, it shall be initially responsible for one-quarter of the independent auditor's fees and expenses, and the Auditing Party is responsible for the remainder. This initial cost-reimbursement is appropriate because an independent auditor is significantly more expensive than using internal resources to conduct the audit.

The Parties have also agreed that depending on the outcome of the audit, the financial burden for the audit may shift. The parties have not agreed however as to the circumstances in which the financial burden will shift and in what amount.

Specifically, the Parties have agreed that if the audit finds an overcharge in excess of 5% by the Audited Party, then the Audited Party is obligated to pay an additional amount for the cost of the audit by reimbursing the Auditing Party for certain amounts it paid to an independent auditor. UCS proposes that in this event, the Audited Party is responsible for the entire cost of the audit, while SBC proposes that in this event, the Audited Party is responsible for only one-half of the cost of the audit.

There is also disagreement as to whether reimbursement is appropriate if the Auditing Party conducts the audit using in-house resources. UCS proposes that if an overcharge exceeds the 5% threshold, the Audited Party compensate the Auditing Party for its reasonable cost to perform the audit using in-house resources. SBC proposes no compensation to the Auditing Party if in-house resources are used.

Based on the foregoing, the outstanding issues are whether the Audited Party should be reimbursed for 100% of its reasonable costs to perform an audit, regardless of the resources used, if the audit finds an overcharge of 5% or more.

Q: Please explain the rationale for an audit-cost shifting provision.

A: It is a common business practice to include a contract that requires regular billing between the parties to the agreement an audit cost-shifting provision. SBC agrees with this principle.

The reasoning behind an audit cost-shifting provision is fairly basic. The Auditing Party should not be required to bear the cost to ensure the Audited Party is billing in accordance with the terms and conditions of their Agreement. That said, because of the inherent complexities of billing and the fact that miscellaneous billing errors will occur, commercial contracts generally adopt a "buffer" or threshold amount of error before the audit costs shift. In the Agreement, UCS and SBC have agreed to a 5% threshold amount. 5% is a generally accepted amount and there is significant commercial precedent for as little as a 2% threshold. For example, the Commission approved 2% audit thresholds in SBC interconnection agreements with Supra Telecom, Inc.,[162] O1 Communications of Illinois, Inc.,[163] and CoreComm Illinois, Inc.[164] In each of these interconnection agreements, if the 2% threshold is met, the billing party must pay for the entire cost of the audit. Similarly, in

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[162] *Interconnection Agreement between Supra Telecom, Inc. and Ameritech Illinois*, I.C.C. Docket No. 00-0418, at XVVIII.1.1 (August 14, 2000).

[163] *Interconnection Agreement between O1 Communications of Illinois, Inc. and Ameritech Illinois*, I.C.C. Docket No. 00-0449, at §28.1 (August 14, 2000).

[164] *Interconnection Agreement between CoreComm Illinois, Inc. and Ameritech Illinois*, I.C.C. Docket No. 00-0316, at §28.1 (June 9, 2000).

SBC's agreement with Metrocall, Inc., the billing party must pay for the entire cost of audit if a 5% threshold is reached.[165]

Most commercial contracts we have seen apply that audit cost-shifting provision in an "all or nothing manner," meaning that if the audit reveals an overcharge against the Auditing Party in excess of the contractually defined threshold, then the Auditing Party is reimbursed for its full costs to perform the audit. Again, this all or nothing approach is premised on the principle that a party should not have to bear the cost to ensure the other party is complying with the terms and conditions of the underlying agreement. SBC's position, that an Auditing Party should not be reimbursed if it uses internal resources and should only be reimbursed for part of its costs if it uses an independent auditor, is an approach we have not seen before and certainly is inconsistent with the commercial basis for the audit-cost shifting provision.

Q: Please explain UCS' proposal and the rationale for its proposal?

A: UCS' proposal is that if it audits SBC's books and records and finds that SBC overcharged UCS in excess of 5%, then SBC should reimburse UCS for the trouble and expense of inspecting SBC's erroneous books, regardless of whether internal resources or an independent auditor is used.

UCS sees no legitimate reason to differentiate cost recovery based on whether an independent auditor or internal resources are used. Either way, UCS incurs cost and expenses to audit SBC's books. If that audit finds a material overcharge, i.e., greater than 5%, UCS should be reimbursed for its reasonable costs incurred to perform the audit and to ensure that UCS is paying for services in the amounts required by the Agreement. An analogy to not

[165] *Interconnection Agreement between Metrocall, Inc. and Ameritech Illinois, Inc.*, I.C.C. Docket No. 00-0309 § 16.1.4, (June 29, 2000).

differentiate depending on the resources used is that when a court awards attorneys fees to a litigant, the fees are also available to reimburse an in-house attorney as well as the outside counsel.

From UCS' standpoint, given SBC's poor track record of being able to bill UCS properly, SBC's position is tantamount to levying a premium charge on UCS to ensure it is being properly billed in accordance with the terms of the Agreement.

Q: Are you saying that SBC has had difficulty properly billing UCS in the past?

A: Yes, UCS has experienced significant billing issues with SBC on previously purchased resale services. UCS entered into a Confirmation of Service Order Agreement with SBC dated May 29, 1997, which, along with the applicable tariff, set out, among other things, pricing for Business Local Usage Services for Bands A, B and C, and prices for other services. At the end of 1998, UCS discovered that SBC had been billing UCS for amounts substantially in excess of what was owed. SBC admitted that it was billing UCS at rates in excess of the service order agreement and tariff, but refused to disclose to UCS the rates it was billing. Therefore, the parties agreed that until SBC corrected its rates, UCS would use an agreed upon methodology for calculating claims for the overcharges, based on the information available to UCS, and would pay the remainder of the amount due. In addition, the service order agreement and tariff also provided two separate conditions under which the prices for services would be reduced. The Parties agreed that the reduced prices should be included in the claims.

As explained more fully in UCS' testimony on Issue 7, SBC granted and processed UCS' billing claims for overcharges for over four years of invoices. Claims for the remaining invoices were simply denied by SBC without explanation and remain in dispute.

Given this history, we believe it inappropriate to require UCS to incur additional expense simply to prove its case to be reimbursed for what are likely inevitable billing overcharges and errors.

Q: Can you please explain SBC's rationale for its position and your thoughts on its position?

A: We cannot explain SBC's rationale for its position because it has provided no rationale to UCS.~~ During negotiations, SBC refused to provide UCS its rationale for its position; instead SBC simply offered a slightly higher amount of cost-reimbursement where overcharges amounting to more than 5% were found, but only where independent auditors were used, and provided no explanation for its limitation.~~ SBC also refused to respond to UCS' data requests asking for the reasons behind its position.[166] Instead, SBC stated that it would provide that rationale in its response to UCS' Petition or in testimony on this issue. If SBC ultimately does provide the reasoning behind its position, we would be glad to address it in supplemental testimony.

That said, we do have some thoughts on SBC's position. First, as noted previously, based on our experience, SBC's position finds no corollary in commercial law. We have not seen any commercial contract that states that a party subject to an overcharge should receive no reimbursement for costs incurred by internal resources and only 50% percent reimbursement if outside resources are used. Second, we see SBC's position as a blatant attempt to protect itself from having its billing systems examined by increasing the cost to UCS of auditing SBC, and thereby decreasing the likelihood of UCS auditing SBC. As noted

[166] UCS Discovery Request 64.

above, SBC does not have a good track record of properly billing Resale Services to UCS. Previously, the parties were able to employ a process by which UCS could avoid auditing SBC and instead submit a request for credits that would be reviewed and then approved by SBC. However, after SBC suddenly declared its billing system fixed—which it wasn't—SBC began refusing UCS' request for credits. Accordingly, UCS believes that any future actions to ensure it is being billed the right amounts in accordance with the terms of the Agreement will be through the audit process.

Because it is financially prudent to do so, UCS will always attempt to utilize internal resources to conduct its audit. If SBC's position is adopted, that means that UCS will never be reimbursed for its cost to perform an audit, even if that audit process repeatedly reveals significant overcharges by SBC. UCS believes this to be unreasonable. UCS' proposal is preferable because it provides better incentives than SBC's proposal for a billing party to keep its billing records in order, and as a result, produce more accurate bills and invoices. UCS should not have to continue to bear the cost of SBC's breach of its obligation to bill UCS amounts prescribed by the Agreement.

Issue 24 – Intervening Law

Q: Please summarize the dispute between UCS and SBC with respect to Issue 24—Intervening Law, whether the Intervening Law provision should be modified to (1) to remove references to orders and decisions that bear no relation to the Resale Services that UCS seeks to purchase under this Agreement; and (2) to reflect a standard "Change of Law" provision that will address future changes to applicable law that will affect the Resale Services offered under this Agreement?

A: The heart of this dispute is whether UCS must agree to "change of law" language that refers to changes in law that have nothing to do with Resale Services. The Agreement is limited to the provision of Resale Services. Accordingly, UCS' proposal removes references to specific appeals and proceedings that have no relation to Resale Services. UCS' proposal also provides that orders or actions that modify the parties' rights and obligations under applicable law will be effective as soon as technically feasible, whether the modification benefits UCS or SBC. Changes in rates will, however, become effective under the Agreement retroactively to the effective date of the applicable order or decision, whether the change benefits SBC or UCS. UCS' definition of a "Change of Law" is substantially derived from the Change of Law provision included in the SBC-AT&T Agreement, which was filed with the Commission on November 14, 2003 in Docket No. 03-717.

SBC, on the other hand, insists that UCS adopt a Change of Law provision that has nothing to do with Resale Services. For example, SBC proposes language in this provision that refers to SBC's obligation to provide UNEs or UNE combinations, even though no other part of the Agreement imposes an obligation on SBC or UCS to provide UNEs or UNE combinations. SBC's proposed language is surplusage that serves no useful purpose and can only be used to create mischief. As another example, SBC insists on language regarding its right to adopt the FCC's intercarrier compensation regime applicable to traffic to Internet service providers, even though UCS has no right under the Agreement to terminate traffic of any kind or to receive terminating compensation.

Finally, SBC proposes language that distinguishes between changes of law that SBC wishes to implement automatically, and other changes of law that are subject to a sixty (60) day amendment negotiation period, followed by dispute resolution if necessary. This self-serving proposal should be rejected, and UCS' more balanced approach should be adopted.

Q: Did UCS serve any discovery in an attempt to ascertain SBC's reasons for its position on this issue?

A: Yes. UCS served the following data request on SBC:

> Set forth all reasons why SBC contends that the Intervening Law provision (presently SBC proposed language at 13.1 of the General Terms and Conditions; See Exhibit C to Arbitration Petition filed herewith) should include references to orders and decisions that bear no relation to the Resale Services that UCS seeks to purchase under this Agreement, such as orders and decisions pertaining to unbundled network elements and facilities-based competition, and should not reflect the "Change of Law" provision UCS has proposed in Exhibit C to the Petition and Identify all Documents that support SBC's position.

SBC refused to answer, claiming that to the extent this information is relevant, it will be provided in SBC's Response and testimony. In light of SBC's refusal to answer, UCS will respond to any SBC contentions in UCS' Supplemental Testimony.

<u>Issue 25 – Limitations on Indemnity Obligations</u>

Q: Please summarize the dispute between UCS and SBC concerning the Limitations on Indemnity Obligations?

A: The Parties disagree as to whether SBC should be permitted to trump the indemnification provisions of the Agreement to which the Parties have specifically agreed by the deployment of tariff provisions regarding indemnification that conflict with the indemnification provisions of the Agreement. SBC gave rise to this issue by excluding from the otherwise agreed-upon indemnification provisions of the Agreement any Loss[167] which is

[167] "Loss" is defined in the Agreement as any and all losses, costs (including court costs), claims, damages (including fines, penalties, and criminal or civil judgments and settlements), injuries, liabilities and expenses (including attorneys' fees).

"otherwise controlled by tariff". SBC's proposed addition to Section 14.2 of the Agreement is inappropriate because it improperly bypasses the provisions included in the Agreement and instead allows SBC to unilaterally supersede the indemnity provisions of the Agreement through modifications to its own tariff. Instead of reciprocal, agreed-upon provisions contained in the Agreement, SBC's proposal (1) creates ambiguity as to each party's rights and obligations relative to indemnification and (2) likely imposes, as demonstrated below, materially different rights and obligations on the different parties.

UCS believes it is entitled to negotiate its carrier-to-carrier provisions regarding indemnification, and should be able to rely on those negotiated provisions during the term of the Agreement. SBC, on the other hand, wants to be in sole control of its own indemnification rights and obligations and seeks to fix those rights and obligations through an instrument that is outside the control of UCS and through which SBC can unilaterally trump the agreed-upon substantive terms and conditions.

Q: What is SBC's specific proposal?

A: SBC's specific proposal is to include the underlined language set forth below in Section 14.2 of the Agreement:

> Except as otherwise expressly provided herein or in specific appendices, and to the extent not prohibited by Applicable Law <u>and not otherwise controlled by tariff</u>, each Party (the **"Indemnifying Party"**) shall release, defend and indemnify the other Party (the **"Indemnified Party"**) and hold such Indemnified Party harmless against any Loss to a Third Party arising out of the negligence or willful misconduct **("Fault")** of such Indemnifying Party, its agents, its End Users, contractors, or others retained by such Parties, in connection with the Indemnifying Party's provision of Resale Services, functions, facilities, products and services under this Agreement; provided, however, that (i) with respect to employees or agents of the Indemnifying Party, such Fault occurs while performing within the scope of their employment, (ii) with respect to subcontractors of the Indemnifying Party, such Fault occurs in the course of performing duties of the subcontractor under its subcontract with the Indemnifying Party, and (iii) with respect to the Fault

> of employees or agents of such subcontractor, such Fault occurs while performing within the scope of their employment by the subcontractor with respect to such duties of the subcontractor under the subcontract.

In addition to the substantive concerns we have with SBC's proposal, which are outlined below, we believe SBC's proposal in Section 14.2 of the Agreement is yet another example where SBC plays "give and take"—it agrees to substantive terms and conditions on one hand (i.e., almost three full pages of indemnification provisions), but then incorporates a few words or a boilerplate provision that obviates the agreed-upon provisions and defers treatment of the substantive issue to its Resale Tariff. Several issues UCS has raised in its Petition are premised on the same concern UCS has with SBC's position on Section 14.2 of the Agreement—that SBC's continued reference that its tariff provision prevail render the negotiated provisions of the Agreement moot and allows SBC to unilaterally prescribe the conditions by which the Parties will be bound.

Q: Please elaborate upon UCS' concerns with SBC's proposal?

A: First, SBC's proposal is ambiguous. Upon review of SBC's proposed language in Section 14.2 and the other mutually agreed upon provisions of Section 14.0, it is unclear whether SBC's tariff provisions cover only those incidents or Losses addressed in Section 14.2 or if they also control other incidents that give rise to indemnification. If limited to Section 14.2, based on its existing Resale Tariff indemnification provisions[168], SBC's proposal is inconsistent with Section 14.3. If SBC intends its tariff to supersede all of the Section 14.0 provisions if the incident or Loss is "controlled by that tariff," SBC's current language certainly does not reflect that position. Regardless of the intended effect of SBC's

[168] See Section 5, Responsibilities of the Carrier, Indemnification, ILL.C.C. NO. 20, Part 22, Section 1, Original Sheet No. 7, attached as UCS Exhibit 14.

proposal, its language is ambiguous, inconsistent and inappropriate for inclusion in the Agreement.

More substantively, UCS believes it improper for SBC to evade the entire 251/252 process UCS has endured by allowing the negotiated language with respect to one of the more important general terms and conditions of the Agreement to be trumped by SBC's unilaterally drafted tariff provisions. CLECs seeking to compete with SBC have an option; they can either seek to negotiate (and if necessary, arbitrate) their own 251/252 agreement or they can purchase products and services through SBC's tariffs. The tariff approach is obviously a more economical approach and it certainly provides a faster time to market. One trade off for taking the tariff route is that the tariffs generally provide less favorable terms to a CLEC than the CLEC may receive through a 251/252 negotiation and arbitration. Another trade off is that tariffs are subject to modification by SBC. In some cases, such as the instant Agreement, a CLEC can take a hybrid approach, establishing the specific rates, terms and conditions in the Agreement it deems most important and allowing the remainder of the less substantive terms and conditions to be incorporated by reference into the Agreement from SBC's tariff.

UCS made a specific judgment with respect to each rate, term and condition it agreed to defer to SBC's tariff and which rate, term and condition it sought to include in the Agreement. Two of the more important general terms and conditions UCS sought to include in the Agreement were the indemnification provisions and limitation of liability provisions. Each of these provisions is vitally important to the carrier-to-carrier relationship because when purchasing Resale Services, UCS has no choice but to rely on SBC's provision of services to UCS end users. If SBC or one of its agents breaches its obligations that give rise to a Loss or otherwise causes a Loss to a third party in the performance of its responsibilities to provide those services, there is a strong likelihood that UCS will be sued and possibly suffer a Loss. To protect itself against such liability that can and is likely going to be caused by SBC and/or its agents, UCS needs to rely on the specific indemnification and limitation of liability provisions of the Agreement. The limitation of liability provisions between the parties, while also the subject of a contested issue, have been agreed by SBC to be fixed within the terms and conditions of the Agreement. Thus, regardless of how SBC may be permitted to modify its exposure to third parties in its tariffs, UCS can rely on the limitation of liability of the Agreement that will apply to both SBC and UCS itself. UCS may in turn leverage the defined limitation of liability provisions to protect itself, to the extent commercially practicable, against exposure to third parties, including its end users.

Under SBC's proposal, UCS cannot, however, rely on the indemnification provisions of the Agreement. Instead, under SBC's proposal, UCS has no idea what provisions will apply with respect to its indemnification rights or obligations vis-a-vis SBC because SBC may unilaterally control those rights and obligations.

UCS believes that providing SBC unilateral control over the indemnification provisions that apply to the Parties is totally unreasonable; it is possible that SBC's tariffs could, at the time of the Loss, provide UCS significantly (i) less coverage and protection and/or (ii) more obligations and greater exposure than UCS is willing, in each case, to accept in its current 251/252 discussions. And, because UCS has no assurance, nor any idea what indemnification provisions might apply to a given Loss, this arbitration proceeding cannot address the commercial reasonableness of those provisions.

Similar to the concerns UCS has raised with regard to other Issues regarding SBC proposals to have its tariffs trump the agreed upon and arbitrated provisions of the Agreement, UCS believes that SBC's current proposal renders the 251/252 negotiation process moot. The Agreement currently has almost three full pages of agreed-upon indemnification provisions. Based on SBC's proposal, these provisions are superfluous, applicable only in the highly unlikely event that SBC's tariffs do not address any Loss that occurs under the Agreement.

Also disconcerting to UCS is that it has made the investment, in terms of deferred time to market, significant negotiation and litigation expense and human capital, to obtain an agreement that meets its business objectives, including appropriately limiting its exposure to third parties in the event of a Loss caused by SBC or its agent. Given this investment, and the fact that the Parties have agreed in the Agreement to a number of general terms and conditions that differ from the analogous terms and conditions contained in the SBC's tariffs, UCS believes it is entitled to participate in the establishment, in this proceeding, of the specific indemnification provisions that will apply during the term of the Agreement and to rely on those provisions.

Finally, applying SBC's proposal will likely always give rise to disparate treatment of the Parties' respective rights and obligations regarding indemnification. This disparate treatment is certainly inconsistent with the supposedly reciprocal indemnification provisions optically included in the Agreement.

Q: How do the agreed upon indemnification provisions of the Agreement differ from the indemnification provisions in the current Resale Tariff?

A: First, a preliminary point. Our statement in this testimony reflects our review of SBC's Resale Tariff indemnification provisions that are in effect as of January 27, 2004.[169] Under SBC's proposal, our answer to the same question one week, one month or one year from now might vary significantly based on the tariff provisions SBC has in effect on that date.

As of the filing of this testimony, the indemnification provisions in SBC's Resale Tariff differ substantially from the provisions in the Agreement. First and foremost, they differ in that SBC's Resale Tariff is totally one-sided, imposing no obligation on SBC to indemnify UCS. Instead, under SBC's Resale Tariff, UCS is the only party with indemnification obligations and SBC is the only party with indemnification rights. Given the absence of any obligation on SBC in its Resale Tariff, we question whether applying SBC's proposal of "not otherwise controlled by tariff" means that (1) the indemnification provisions of the Agreement apply with respect to SBC's indemnification obligations to UCS or (2) as per the Resale Tariff, that SBC has no current obligation to indemnify UCS. As noted below, UCS does not have the benefit of SBC's position in this regard; accordingly, from UCS' perspective, we are already faced with an ambiguity as to which indemnification provisions, if any, apply.

Suppose, however, for the sake of argument that, in accordance with SBC's proposal in Section 14.2, we resolve the ambiguity to the effect that UCS' indemnification obligations and SBC's indemnification rights are established by SBC's Resale Tariff and not the

[169] SBC supplements its general indemnification provisions of its Resale Tariff, found at ILL. C.C. No. 20, Part 22, Section 1, Original Sheet No. 7, with several other service/issue specific indemnification provisions, which include, but are not limited to, those provisions found in ILL. C.C. No. 20, Part 22, Section 1, 6th Revised Sheet No. 2, Original Sheet No.5, Original Sheet No. 7 and 1st Revised Sheet No. 13. Each of these tariff pages are attached as UCS Exhibit 15.

Agreement. In such a case, UCS' obligation to indemnify SBC for an incident is materially greater than what UCS' obligations would be if the incident were controlled by the provisions of the Agreement. If the same type of incident were to occur but instead SBC was the "indemnifying party," we can reach one of two conclusions: Either SBC has no obligation at all to indemnify UCS or, perhaps the more reasonable approach, SBC's indemnification obligations are controlled by the Agreement. In either case, for the same type of incident or Loss, SBC's rights to indemnification are greater than UCS' rights and UCS' indemnification obligations are more onerous than SBC's obligations. The conclusion that the Parties would be subject to materially different rights and/or obligations relative to indemnification, regardless of the example used or to whose benefit the differences inure, evidences the unreasonable application of SBC's proposal.

Q: What is SBC's rationale for its position?

A: SBC has provided UCS no rationale in negotiations as to why its proposal is appropriate and, as noted above, how to reconcile its ambiguous application. SBC also failed to substantively respond to UCS' discovery request[170] asking for its reasoning behind its position:

> Set forth all reasons why SBC contends that SBC should be allowed to limit its indemnity obligations and UCS' indemnity rights by excluding from the agreed-upon contractual indemnity provisions that which "is otherwise controlled by tariff", and Identify all Documents that support SBC's position.

SBC's refusal to answer was based on its claim that to the extent this information is relevant, it will be provided in SBC's Response and testimony. In light of SBC's refusal to answer, UCS will respond to any SBC contentions in UCS' Supplemental Testimony. UCS assumes,

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[170] UCS Discovery Request 66.

similar to SBC's Position on other contested issues, that SBC wishes to use its tariff in order to be able to revise the indemnification provisions of the Agreement in its sole discretion.

<u>Issue 26 –Scope of Agreement</u>

Q: Please summarize the dispute between UCS and SBC with respect to Issue 26—Scope of Agreement, whether SBC may expressly limit its obligations to UCS as required by the Act to include only the terms and conditions provided in the Agreement.

A: SBC proposes including the following language in Section 28.1 of the Agreement that strictly limits its obligations to UCS: "Except as agreed in writing, neither Party shall be required to provide the other Party a function, facility, product, service or arrangement described in the Act that is not expressly provided herein." This issue is similar to Issue 24 in that SBC seeks to strictly limit UCS' rights in the event of a change of law. Under SBC's proposal, in the event that a function, product, service or arrangement becomes available to UCS as a result of a change of law, UCS must first negotiate an amendment with SBC to be able to obtain that function, product, service or arrangement from SBC. This approach is obviously in SBC's self-interest because it allows SBC to delay and/or withhold services that UCS is entitled to pursuant to the applicable law creating the new function, product, service, or arrangement. SBC would, in all likelihood, delay providing the new service for as long as it takes to negotiate an amendment, and if necessary, complete dispute resolution proceedings.

Q: Has SBC explained why it wants to include the language it has proposed?

A: No, it hasn't.

Q: What does UCS propose to do?

A: UCS proposes excluding the sentence suggested by SBC. In the event of a change of law, the Change of Law provision will govern the parties' rights and obligations. By including the language suggested by SBC, the Agreement could have an internal inconsistency between the Scope of Agreement and the Change of Law. The Scope of Agreement language could require an executed amendment to the Agreement when the Change of Law provision does not. You can be sure that, in the event of an internal inconsistency, SBC will exploit it to its maximum benefit. The Commission should avoid the potential problem entirely by rejecting SBC's proposed language that modifies Section 28.1 of the Agreement.

Q: Did UCS serve any discovery in an attempt to ascertain SBC's reasons for its position on this issue?

A: Yes. UCS served the following Interrogatory 67 on SBC:

> Set forth all reasons why SBC contends that SBC may expressly limit its interconnection obligations to UCS to only the terms and conditions provided in the Agreement and Identify all Documents that support SBC's position.

SBC refused to answer, claiming that to the extent this information is relevant, it will be provided in SBC's Response and testimony. In light of SBC's refusal to answer, UCS will respond to any SBC contentions in UCS' Supplemental Testimony.

<u>Issue 27 – Whether the Agreement Terminates if a Governmental Entity Authorizes Another CLEC to "Pick and Choose"</u>

Q: Please summarize the dispute between UCS and SBC with respect to Issue 27 – Whether the Agreement should include a provision stating that SBC may terminate the Agreement if the Commission or another governmental entity allows another CLEC to "pick and choose" portions of the Appendix Resale?

A: SBC has proposed that the Agreement should include a provision stating that SBC may terminate the Agreement if the Commission or another governmental entity allows another CLEC to "pick and choose" portions of the Appendix Resale or otherwise allows another CLEC to use portions of Appendix Resale with a tariff other than the CompleteLink Tariffs set forth in Appendix Resale Section 2.1. UCS opposes such a provision.

Q: What is UCS' basis for opposing such a provision?

A: SBC's proposal is an improper attempt by SBC to limit its statutory obligation to allow other CLECs to "pick and choose" portions of UCS' agreement pursuant to 47 C.F.R. § 51.809.[171] More importantly, allowing SBC to terminate UCS' Agreement simply because SBC's interpretation of its statutory or contractual obligations has been rejected by a governmental agency with jurisdiction to interpret the law would deny UCS the right to continue under an agreement that was duly approved by this Commission, merely because SBC's view of the law regarding "pick and choose" has been rejected by the Commission and/or the courts.

Q: How would the inclusion of SBC's proposed language impact competition?

A: It would have a very adverse impact. Competitors would be denied their rights under 47 U.S.C. § 252(i) and 47 C.F.R. § 51.809 to "pick and choose" portions of UCS' agreement. This might force them to needlessly undertake a costly and time-consuming negotiation or arbitration simply to obtain an agreement that the Commission and/or the courts have ruled they are entitled to have. In effect, it would allow SBC to overrule a determination by this

[171] SBC also proposes that it have the right to terminate the agreement under other circumstances similar to the exercise of "pick and choose" rights, such as if another carrier is permitted to utilize all or part of the Appendix Resale with a tariff other than CompleteLink. That portion of SBC's proposal should be rejected for the same reasons as the "pick and choose" portion of SBC's proposal.

Commission or by the courts that SBC was required to allow another CLEC to "pick and choose" portions of UCS' agreement. While it is indisputable that SBC should be *subject to* the law, SBC's proposal would place it *above* the law.

Q: How would the inclusion of SBC's proposed language impact UCS?

A: The impact on UCS would be devastating. If another CLEC sought to exercise its "pick and choose" rights under C.F.R. § 51.809, and the Commission or a court upheld that exercise of rights, UCS would lose the entire benefits of the Agreement. It is wholly unreasonable for UCS to be deprived of the Agreement it spent the time and money to negotiate and arbitrate simply because a third party exercised its "pick and choose" rights.

Q: Is there a relationship between Issue 27 and any other Issue in this arbitration?

A: Yes. SBC's position with respect to Issue 27 amounts to an assertion that despite a Commission or court ruling to contrary, all provisions of the agreement are reasonably related to one other. This is similar to SBC's position with respect to Issue 28 (Severability). As discussed in further detail in Issue 28, that position makes no sense with respect to an arbitrated agreement such as this one. Given the fact that many provisions will have been arbitrated, rather than negotiated, it cannot be the case that these provisions were "traded off" for other provisions. In any event, SBC will have an opportunity to make such an argument when the adopting CLEC attempts to "pick and choose" from UCS' Agreement. If SBC's position is rejected by the Commission or court, it should not have the opportunity to overrule the Commission or Court by simply terminating UCS' agreement.

Q: Has SBC provided UCS any rationale for its position, including why its proposal should be permitted despite 47 CFR § 51.809?

A: No. SBC did not provide any support for its position during negotiations and UCS served the following data request[172] on SBC:

> Set forth all reasons why SBC contends that SBC may terminate the Interconnection Agreement if the Commission or another governmental entity allows another CLEC to "pick and choose" portions of the Appendix Resale, or otherwise allows another CLEC to use portions of Appendix Resale with a tariff other than the CompleteLink Tariffs, and Identify all Documents that support SBC's position.

SBC refused to answer, claiming that to the extent this information is relevant, it will be provided in SBC's Response and testimony. In light of SBC's refusal to answer, UCS will respond to any SBC contentions in UCS' Supplemental Testimony.

<u>Issue 28—Which Severability Provision is Appropriate for Inclusion in the Arbitrated Agreement?</u>

Q: Please summarize the dispute between UCS and SBC with respect to Issue 28—whether the Agreement should include a severability clause that provides that the Agreement will terminate if the Parties are not able to reach agreement on a mutually satisfactory provision to replace a severed provision?

A: UCS' proposed severability language is borrowed directly from the recently arbitrated SBC-AT&T interconnection agreement. This language appropriately recognizes that the Agreement will be established through arbitration and requires only that the Parties attempt to negotiate replacement language for any "rejected" language. The existence of rejected language, or the Parties' failure to reach agreement on successor language, should not effect the validity of the remainder of the Agreement nor, as provided in SBC's proposal, should it grant a party the right to terminate the entire Agreement.

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[172] UCS Discovery Request 69.

Q: How does SBC justify its position?

A: SBC' proposed language is premised on the idea that the entire Agreement has been negotiated, and that "as a total arrangement it is intended to be nonseverable." This position is obviously mistaken because significant portions of this Agreement are now being arbitrated by the Commission. Thus, if the Commission were to order the parties to adopt certain language as a result of this arbitration and that language were subsequently found to be unenforceable, the entire arbitrated agreement—and along with it, the combined efforts of the Commission—could be discarded and the parties would be compelled to begin anew if the parties could not agree on replacement language.

Q: Are there other reasons why SBC's proposed language should be rejected?

A: Yes. SBC's proposed language should also be rejected because it might give SBC an opportunity to undo the results of this arbitration that are favorable to UCS. If the unenforceable language was voluntarily agreed upon by the parties—rather than ordered by the Commission—the right to terminate the entire agreement would unreasonably provide a party that was satisfied with the unenforceable language the unilateral right to circumvent adverse arbitration decisions reached by the Commission on totally unrelated issues.

Q: Did UCS serve any discovery in an attempt to ascertain SBC's reasons for its position on this issue?

A: Yes. UCS served the following data request[173] on SBC:

> Set forth all reasons why SBC contends that the Interconnection Agreement will terminate if the parties are not able to reach agreement on a mutually satisfactory provision to replace a severed provision and Identify all Documents that support SBC's position.

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173 UCS Discovery Request 70.

SBC refused to answer, claiming that to the extent this information is relevant, it will be provided in SBC's Response and testimony. In light of SBC's refusal to answer, UCS will respond to any SBC contentions in UCS' Supplemental Testimony.

<u>Issue 29 – Performance Measures</u>

Q: Please summarize the dispute between UCS and SBC concerning Issue 29 – Performance Measures

A: The parties have not agreed on the terms and conditions to describe the performance measures, remedies, and credits that SBC is required to offer under applicable federal and state law. UCS made a number of requests for SBC to provide UCS with an offer of the terms and conditions that address SBC's rights to provide Performance Measures and Remedy Plans consistent with its obligations under the FCC Merger Conditions,[174] Illinois Merger Conditions,[175] Illinois code section 732.35, requirements resulting from the section 271 proceeding, and other provisions of applicable law. Notwithstanding UCS' repeated requests for such an offer, SBC's offer, which was received on November 20, 2003, months after UCS' initial request and only shortly before the arbitration deadline, fell short, consisting of outdated language not reflective of SBC's current obligations. Given that the parties did not have an opportunity to discuss the Performance Measures and Remedy Plans before UCS had to file for arbitration, UCS adopted as its proposal an Appendix Performance Measurement that mirrors the language included in the SBC-AT&T interconnection agreement that was filed in Docket No. 03-717 on November 14, 2003 (the "AT&T

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[174] FCC SBC Ameritech Merger Order, CC Docket No. 98-141, FCC No. 98-141.

[175] Illinois Merger Conditions, Docket No. 98-0555.

Agreement"). UCS believes its proposed Appendix Performance Measurement properly addresses SBC's obligations and UCS' rights with respect to Performance Measurements and Remedy Plans.

Q: What is UCS' position on Performance Measurements and Remedy Plans?

A: From the first substantive conference call in our negotiations with SBC, UCS has made it clear that it is only requesting SBC to provide UCS with any Performance Measurements or Remedy Plans that SBC is already required, by orders of this Commission and/or the FCC, to provide all CLECs. The language proposed by UCS would simply incorporate into the Agreement terms and conditions that currently reflect and would continue to reflect during the term of the Agreement SBC's obligations on these issues as ordered by the Commission and the FCC and as may be voluntarily agreed upon by SBC.

SBC's offer to UCS did not reflect SBC's current obligations as mandated by the Commission. Although SBC's offer may have reflected SBC's obligations as of some time ago, there is no basis for incorporating outdated obligations. Accordingly, UCS reviewed the voluntarily agreed upon provisions of the AT&T Agreement to determine if that agreement reflected SBC's obligations under applicable law. UCS found that the provisions of the AT&T Agreement adequately addressed UCS' concerns and thus UCS adopted those provisions as its proposal. Given that these exact provisions were recently voluntarily agreed upon by SBC, UCS is aware of no reasonable basis for SBC to object to them.

Even if SBC does object to UCS' proposal, the Commission should adopt UCS' proposal as it is reasonable and accurately reflects SBC's obligations with respect to Performance Measurements and Remedy Plans. Specifically, UCS proposes that the parties accept and abide by the Performance Measurement Remedy Plan and Schedule, and the state specific Business Rules, as ordered by the Commission and the FCC. UCS' proposal also requires the parties to incorporate any changes to the plan, schedule and Business Rule made by the Commission or the FCC. Finally, UCS' proposal allows each party to reserve its rights to seek appropriate legal or equitable review of the Commission's order and provides for an appropriate carve-out to the extent SBC's noncompliance is the result of delays or problems proximately caused by UCS' service bureau provider.

Q: If SBC is already required to make such remedies available to UCS, why does such a requirement need to be in the Agreement?

A: There is some uncertainty in the law regarding whether a CLEC has the right to recover for an ILEC's breach of a general duty that is not incorporated into their interconnection agreement.[176] UCS wants to be certain that if SBC breaches these duties, it will have the right to file suit against SBC for breach.

Q: Can you explain SBC's position on this issue?

A: No, we cannot. SBC has provided no rationale for its position. Further, SBC declined to answer the following UCS' discovery request[177] seeking an explanation of its position on this issue:

> Set forth all reasons why SBC contends that SBC is not obligated to provide UCS with the right to all performance measures, remedies, and credits that SBC is required to offer under applicable federal and state law and UCS cannot be deemed to have elected to participate in such programs to the extent an opt-in is required and Identify all Documents that support SBC's position.

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[176] See *Law Offices of Curtis V. Trinko, LLP v. Bell Atlantic Corp.* 305 F. 3d 89, 104-105 (2d. Cir. 2002), *rev'd on other grounds*, 72 USLW 4114, 2004 WL 51011 (January 13, 2004).

[177] UCS Discovery Request 71.

SBC refused to answer, claiming that to the extent this information is relevant, it will be provided in SBC's Response and testimony. In light of SBC's refusal to answer, UCS will respond to any SBC contentions in UCS' Supplemental Testimony.

<u>Issue 30 – SBC's Attempt to Have its Tariff Control over the Terms of the Agreement</u>

Q: Please summarize the dispute between UCS and SBC concerning Issue 30 – SBC's Attempt to Have its Tariff Control over the Terms of the Agreement

A: The parties disagree as to what document(s) should control in the event there is a conflict between any provision in the Agreement and any provision in one of the other instruments that applies to UCS' purchase of Resale Services. As noted in UCS' testimony in Issue 5, there are generally three instruments that govern UCS' purchase and SBC's provision of Resale Services: (1) the Agreement, including the appendices attached thereto, is the umbrella agreement that will govern all purchased Resale Services; (2) the Resale Tariff, which is incorporated by reference into the Agreement for ease of referencing certain of the Resale Services available under the Agreement, will also provide certain rates, terms and conditions that govern (in part) the Resale Services; and (3) the Service Agreement, whether in the form of a stand-alone separate agreement such as the form CompleteLink Agreement, a confirmation of service order or a resold ICB, which will also prescribe specific rates, terms and conditions that will apply to UCS' purchase of Resale Services.

As noted in UCS' testimony on Issue 5, for each purchase of Resale Services, at least two of these instruments, and in some cases, all three of these instruments, will apply to the purchased Resale Services. Further, each of the instruments will prescribe rates, terms and/or conditions that on their face apply to the purchased Resale Services but also expressly conflict with each other. For example, if UCS purchases an Ameritech CompleteLink

Offering and commits to the highest MARC available, the Appendix Resale states, as agreed upon by UCS and SBC, that the 250 Business Location Restriction *does not* apply. This provision squarely conflicts with the Resale Tariff and the Service Agreement that SBC requires UCS to execute before SBC will provision the purchased services, each of which state that the Business Location Restriction *does* apply. SBC and UCS each appear to agree that the conflict among the governing instruments must be resolved; the Parties, however, disagree on how to resolve that conflict.

Q: How does SBC propose to resolve the conflict among the instruments?

A: SBC appears to believe that the terms of its tariffs should in all cases prevail over the rates, terms and conditions agreed to by the parties and established by the Commission. SBC has proposed language in Section 2.10.2 of the Agreement that states "In the event of a conflict between any provision in this Agreement and any provision in the commission-ordered-tariffs covering the services that are the subject of this Agreement such commission-ordered tariffs will prevail." Based on SBC's proposal, any conflict between the rates, terms and conditions of the Agreement, including its appendices, and the commission-ordered tariffs will be resolved in favor of SBC's tariffs. We also note that SBC identifies in its Resale Tariff that "[t]he Company [i.e., SBC] has filed this tariff under compulsion of the Illinois Public Utilities Act and at the direction of the Illinois Commerce Commission[.][178]

Q: Has SBC provided UCS any rationale for its position?

A: No, SBC has not provided UCS any rationale for its position. SBC refused to answer the following data request[179] provided to SBC:

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178 ILL. C.C. No. 20, Part 22, Section 1, 10^{th} Revised Sheet No. 1.

179 UCS Discovery Request 25.

> Set forth all reasons why SBC contends it should be permitted to retain the right to unilaterally modify a contract it has entered into with UCS for resale of tariffed services by changing the underlying tariff and thereby changing the MARC, MAD, volume discount and other terms of the UCS contract and identify all Documents that support any of these reasons.

SBC refused to answer, claiming that to the extent this information is relevant, it will be provided in SBC's Response and testimony. In light of SBC's refusal to answer, UCS will respond to any SBC contentions in UCS' Supplemental Testimony.

Q: What are UCS' concerns with SBC's proposal?

A: If SBC's proposal were adopted, the entire 251/252 negotiation and arbitration process would be rendered moot. As noted throughout UCS' testimony and as indicated in the Agreement attached as Exhibit C to UCS' Petition, the parties have already agreed to a number of rates, terms and conditions in the Agreement and the Appendix Resale that expressly conflict with SBC's Resale Tariff. Depending upon the Commission's arbitration decision, additional provisions awarded by the Commission may also conflict with SBC's Resale Tariff (to the extent SBC does not modify its Resale Tariff to incorporate the Commission's arbitration award—which it historically has not done). It is patently unreasonable and farcical on its face for SBC to propose that, notwithstanding the agreements it has reached with UCS after months of negotiations and the Commission's award after what will be an extensive proceeding, SBC's Resale Tariff should prevail over the conflicting provisions of the Agreement as agreed by the Parties and as imposed by the Commission.

In addition, SBC has also proposed language at Section 2.2.1 of the Agreement that, when read together with its proposed Section 2.10.2, allows SBC to modify in the future the rates, terms and conditions of the Agreement approved by the Commission simply by changing its underlying tariffs. As proposed by SBC, Section 2.2.1 provides that "Wherever any Commission ordered tariff provision or rate is cited or quoted herein, it is understood that said cite encompasses any revisions or modifications to said tariff." Reading SBC's proposed Sections 2.2.1 and 2.10.2 together, SBC may trump any agreed upon or Commission ordered provision included in the Agreement simply by making a unilateral tariff modification.

If SBC's proposal were adopted, it means that all effort expended by UCS since it requested negotiations with SBC on May 13, 2003 (as well as the effort of the Commission in this proceeding) will have been meaningless and that SBC could in all cases insulate itself from the Commission arbitration award.

Finally, even though we believe that SBC's proposal must be rejected for the foregoing reasons, another criticism of SBC's proposal is that it neglects to address the conflict that will occur between the Agreement and the Service Agreements and the SBC Resale Tariff and the Service Agreements.

Q: How does UCS propose to reconcile conflict among the various instruments?

A: As noted in Issues 5 and 32, the instruments that will "govern" UCS' purchase of Resale Services include the Agreement (including the appendices), SBC's Resale Tariff and for Resale Services that include a volume, revenue or term commitment, a Service Agreement. Each of these instruments may apply at the same time to a UCS purchase of Resale Services; unfortunately, the rates, terms and conditions of each of the instruments are not consistent, but in fact, expressly conflict with each other. UCS raised this "structural" issue during the first days of the parties' negotiations and has proposed language in Sections 2.10.2 (including its subsections) of the Agreement that proposes a proper reconciliation of conflicting terms among the various instruments. For example, UCS' proposed language provides that the Agreement (including the appendices) approved by the Commission will control over the SBC unilaterally established terms of the "Resale Tariff, a Resale Notification and any Service Agreement executed during the Term."[180] In addition, UCS' proposed language also correctly states that the specific rates that correspond to the actual Resale Services purchased and included in a Service Agreement executed during the term of the Agreement will "control over the Resale Tariff or a Resale Notification."[181]

Q: Why do you believe UCS' approach is more appropriate than SBC's proposal?

A: First, as previously noted, we believe SBC's proposal cannot even be given serious consideration because it moots the entire negotiated and arbitrated agreement and allows SBC to unilaterally set the rates, terms and conditions that would control UCS' purchase.

We believe UCS' proposal on how to reconcile conflicts in provisions is appropriate for a number of reasons. First, UCS' proposed language allows the Parties to rely on and receive the rates, terms and conditions of the Agreement as approved by the Commission. Specifically, in UCS' proposed Section 2.10.2.1 UCS proposes that the Agreement will control over the Resale Tariff, Resale Notification and Service Agreement; documents that have been unilaterally drafted by SBC and may be unilaterally modified by SBC. UCS' proposed language honors the agreed and arbitrated terms of the Agreement and allows UCS to rely upon the provisions of the Agreement to make an informed decision on the Resale Services it wishes to purchase and the rates, terms and conditions that will apply during UCS' purchase commitment for such services. This provision also properly precludes SBC

[180] Section 2.10.2.1 of the Agreement.

[181] Section 2.10.2.2 of the Agreement.

from unilaterally modifying through a subsequent tariff modification the rates, terms and conditions specifically included in the Agreement.

UCS' proposal in its proposed Section 2.10.2.2 recognizes that the Service Agreement provides the specific rates, terms and conditions applicable to the purchased Resale Services versus the more general, available rates included in the Resale Tariff. As such, UCS' proposed Section 2.10.2.2 provides UCS the same protection against future rate increases that SBC provides its end users. For example, SBC's retail form Confirmation of Service Order Exchange Dedicated Communications Services—Base, Rate, Fractional DS1, DS1 and DS3 Service, a "Service Agreement" SBC employs to govern its retail end users' purchase of the named services (e.g., DS1, DS3, etc.) out of the SBC retail tariffs, provides that the rates applicable to the purchased service will not increase above the monthly charges identified in that Service Agreement. Thus, UCS' proposal ensures that UCS, similar to an SBC retail end user, may rely upon the rates contained in its Service Agreements irrespective of any subsequent, negative rate change SBC makes to the Resale Tariff. As such, UCS' proposal also ensures that each party receives the benefit of its bargain.

Finally, UCS' proposal is complete. It specifically identifies in UCS proposed Section 2.10.2 each of the instruments that applies to UCS' purchase and SBC's provision of Resale Services.

Q: Has SBC agreed to language along the lines you have suggested with any other CLEC?

A: Yes. The interconnection agreement between SBC and TDS Metrocom in Illinois states very clearly that "No Tariff filing will supercede any provision of this agreement."[182] There is no legitimate reason for SBC not to agree to substantially the same language in its Agreement with UCS.

<u>Issue 31 – Effect of SBC's Unilateral Tariff Revisions on Services Resold Pursuant to Contract</u>

Q: Please summarize the dispute between UCS and SBC concerning the Effect of SBC's Unilateral Tariff Revisions on Services Resold Pursuant to Contract

A: The Parties disagree as to what effect an SBC tariff modification will have on Resale Services that are purchased by UCS pursuant to a Service Agreement. UCS believes that if it makes a term, volume or revenue commitment to purchase Resale Services pursuant to a Service Agreement, it should receive the benefit of the bargain for which it contracted in the form of fixed prices, terms and conditions during the term of its commitment. SBC, consistent with its position on several other contested issues, believes that the terms of its then applicable tariffs should control UCS' purchase of Resale Services, regardless of what rates, terms and conditions were available under the tariff at the time UCS made its commitment and/or are included in the Service Agreement evidencing UCS' commitment. Thus, in contrast to UCS' position that the rates, terms and conditions of a Service Agreement should be fixed for the term of that agreement, SBC proposes that the Resale Services subject to the agreement "float" in accordance with the then applicable rates, terms and conditions of the tariff that governs the Resale Tariff. The specific provisions of the

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[182] Section 38.2, Interconnection Agreement—Under Sections 251 and 252 of the Telecommunications Act of 1996 Between Illinois Bell Telephone Company (Ameritech Illinois) and TDS Metrocom, Inc.

Agreement in dispute are Sections 2.2.1, 2.2.3 and 2.10.2 of the Agreement and Sections 2.1 and 2.2.5 of the Appendix Resale.

Q: Can you explain SBC's proposal and what you believe is its rationale for that position?

A: Yes. As best as we can tell, SBC's proposal appears to be that all Resale Services purchased by UCS should be treated as month-to-month services, meaning that irrespective of any term, revenue or volume commitment made by UCS for specific Resale Services, SBC can modify the rates, terms and conditions that apply to such Resale Services by unilaterally modifying its tariffs. SBC's proposal in this regard is consistent with its position on other contested issues between the parties, in which SBC has taken the position that the provisions of its tariffs trump any conflicting provisions relative to Resale Services that are included in the Agreement.

We believe that SBC's rationale for its position is that it believes that UCS' request for fixed rates for Resale Services purchased subject to and during the term of a Service Agreement goes beyond SBC's obligation under Section 251(c)(4) of the Act because in the event of a subsequent tariff modification, UCS would be able to purchase Resale Services on rates, terms and/or conditions that were no longer being offered at retail. SBC also stated that "UCS cannot lock into an arrangement when its retail counterparts cannot."[183]

Apart from one comment by SBC in a redline, UCS has received no additional rationale from SBC regarding its position. SBC also refused to answer data requests on this issue, claiming that to the extent this information is relevant, it will be provided in SBC's

[183] See Paul Dorin comment to Section 2.2.3 of the Agreement, SBC Comments on Redlined Agreement, October 20, 2003, UCS Exhibit 16.

Response and testimony. In light of SBC's refusal to answer, UCS will respond to any SBC contentions in UCS' Supplemental Testimony.

Q: Based on your investigation, are SBC retail end users precluded from "locking" into purchases of Telecommunications Services from SBC?

A: No, in fact everything we have seen from SBC relative to a retail end user making a term, revenue or volume commitment seems to indicate that one of the benefits, if not the primary benefit, of making such a commitment is that the end user receives guaranteed pricing during the term of its commitment.

For example, in testimony submitted before the Commission in the Termination Liability Proceeding, Mr. Thomas Wilson, witness for SBC, stated that "[C]ustomers receive multiple benefits under Ameritech's optional calling plans, including quality telecommunications services, <u>guaranteed discounted prices</u> and certainly of supply."[184] SBC requires its retail end users to enter into a Service Agreement to purchase term optional calling plans. SBC's retail form Confirmation of Service Order Exchange Dedicated Communications Services—Base, Rate, Fractional DS1, DS1 and DS3 Service, a "Service Agreement" used to purchase the named services out of the Resale Tariff, provides that the monthly charges for the term are based on term plan rates in effect "at the time Service is ordered" and that during the term the rates applicable to the purchased service will not increase above the monthly charges identified in that Service Agreement.[185] In fact, that form Service Agreement also provides that if the rates applicable to the purchased services

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[184] *Termination Liability Order* at page 8 (emphasis supplied).

[185] See UCS Exhibit 17, page 1. Also, consistent with UCS' proposed definition of a "Service Agreement" at UCS proposed Section 1.1.29 of the Agreement, the Confirmation of Service Order is a "Service Agreement" for a purchase of DS1 Service.

decrease during the term, that lower rate will automatically apply to the monthly charges identified in that agreement.[186] Further, an Ameritech Centrex Service Confirmation of Order and Understanding for one of its retail end users provides that the "Monthly recurring Centrex prices are based on Tariff rates effective on the date this Agreement is fully executed by both Customer and Ameritech."[187] In addition, in discussions regarding this specific issue between UCS and Mr. Karl Wardin, Director of Local Competition for SBC, Mr. Wardin stated that he believed SBC's policy was that a subsequent tariff modification that imposed increased rates would not adversely affect an SBC retail term commitment end user and that the benefit of decreased rates through a subsequent tariff modification were generally passed on to such retail term commitment end users.

Based on everything we have seen as to how SBC treats its retail end users, we do not believe UCS has asked that SBC provide UCS anything more than SBC provides its retail end users and what are standard terms and conditions for a purchaser making a volume and/or term commitment.

Q: What is UCS' specific proposal and how does UCS' proposal differ from the manner in which SBC treats its retail end users?

A: UCS has proposed language in Sections 2.2.1 and 2.2.3 of the Agreement that provides that those services UCS purchases under a Service Agreement (i.e., UCS has made a firm financial commitment in that agreement to purchase a minimum amount of Resale

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[186] Confirmation of Service Order Exchange Dedicated Communications Services—Base, Rate, Fractional DS1, DS1 and DS3 Service, retail form dated June 2003 ("Rates: Monthly Charges are based on term plan rates in effect at the time Service is ordered, and are set forth on Page 2. During the term rate decreases, as applicable, will automatically be applied to the Monthly Charges. Rates will not increase above Monthly Charges set forth on page 2 for Services between the locations listed in this Order.[]" (emphasis supplied).

Services) executed during the term of the Agreement will be governed by the rates, terms and conditions that applied to those services on the date such commitment and contract is made. UCS' proposal allows the provisions that were in effect on the date UCS entered into its commitment—the provision on which UCS based its decision to make such commitment—to apply during the term of UCS' commitment for those Resale Services that are subject to such commitment. Thus, when UCS makes a five year commitment, it will receive stability and assurances of the rates, terms and conditions that will apply during those five years for which it guaranteed the purchase of the identified Resale Services.

UCS' proposal also provides that Resale Services that are not subject to a Service Agreement would, subject to any applicable provisions of the Agreement, continue to be governed by the applicable rates, terms and conditions of the then current Resale Tariff.

Based on UCS' review of SBC's current practices and the information it makes publicly available to its retail end users, UCS believes its proposal is consistent with the manner in which SBC treats its retail end users.

Q: Leaving aside that SBC's proposal appears to discriminate against UCS, what other concerns does UCS have with SBC's proposal?

A: UCS has several additional concerns. First, UCS, like any other purchaser (wholesale or retail) that enters into a commitment to purchase services or products over a set period of time or for a threshold amount, needs certainly as to the price and nature of the committed services. SBC's proposal deprives UCS of the benefit of its bargain for making a commitment. As with an end user, once UCS makes a financial commitment to a multi-year

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[187] See UCS Exhibit 18, at Section 3.

Service Agreement (or other term agreement), it has assumed economic risk. That economic risk is assumed by UCS in consideration for UCS to receive the benefit of its bargain for which it contracted. Among other items, in each Service Agreement UCS has usually guaranteed SBC a threshold amount of revenue over a set period of time in exchange for a firm price under certain terms and conditions. SBC presumably proposes to retain the right to modify the risk assumed by UCS and to deprive UCS of the benefit of its bargain by imposing unilateral tariff modifications that can materially change the price of the services purchased. This change could come in the form of a basic rate or discount change or could even be in the form of modifying the services that contribute to satisfaction of UCS' MARC or modifying the services that receive the MARC discount. SBC could even impose a higher MARC under a given offering, which would have implications on the benefits UCS and SBC have voluntarily agreed that will inure to UCS if UCS commits to the highest MARC available under certain offerings. Yet another example is that SBC could unilaterally modify the termination liability associated with a given service, substantially increasing UCS' financial exposure under the terms of the Service Agreement. Each of these changes, and any other tariff modification that adversely alters the economic relationship between SBC and UCS during the term of a commitment purchase, may and likely will have an unreasonable and anticompetitive effect on UCS.

Second, SBC's proposal also gives it the right to unilaterally impose terms and conditions that could conflict and interfere with UCS' provision of services to its end users. For example, SBC could impose a restriction that precludes UCS from aggregating end user locations across the SBC-Midwest service area, a condition of service SBC currently permits for certain services. To the extent SBC imposes a term or condition that conflicts with the manner in which UCS is providing the service, it may prove very difficult, if not impossible, for UCS (or its end users) to comply with the revised terms or conditions of service.

The list of possibilities is infinite, because there is no effective check or balance on SBC's right to impose modifications that may have a detrimental effect on UCS' continued purchase of Resale Services that are subject to a term or volume commitment. Without the protections embodied in UCS' proposed language, SBC can readily exploit its ability to change its tariffs unilaterally to change the terms of executed Service Agreements. Moreover, it is obviously impractical for UCS to resell services if it cannot promise to end users that the rates, terms and conditions of their agreements will remain in effect during the term of their contracts with UCS.

The effect of SBC's proposal also renders the terms of a Service Agreement illusory. SBC expects UCS to adhere to its purchase commitment of the Service Agreement but SBC need not honor the agreed terms and conditions of its resale volume and term contracts and instead reserves the right to modify any such contracts through its underlying tariffs. As such, we believe SBC's proposal is unreasonable and discriminatory, unconscionable and anti-competitive in violation of sections 13-514 and 9-250 of the PUA.

Q: Doesn't the fact that Resale Services are based on SBC's retail telecommunications services protect UCS from unreasonable tariff modifications as SBC would have to impose the same modification on its retail end users?

A: No, there are a number of reasons why that does not alleviate any of UCS' concern. First, and most importantly, SBC could impose a new element to a retail service that has little effect on a retail end user but when translated to resale, could have a significant effect on a CLEC reseller. One example is that mid-term of a Service Agreement SBC could establish a significantly higher MARC, one that might not affect a retail end user but that could affect a CLEC that has aggregated multiple end users to meet the demand requirements of the highest MARC made available at the time the CLEC entered into the Service Agreement. Thus, the new MARC *as applied* might discriminate against UCS and other CLECs. Second, as noted previously, in our negotiations SBC appears to be taking a position against UCS that is contrary to the manner in which SBC treats its retail end users. Consistent with that position, SBC could seek to apply the new provisions against UCS if permitted by the terms of the Agreement but not apply the same detrimental new provisions against its retail end users. Third, SBC, as the incumbent LEC, has the right and has in fact exercised its right to waive or not apply certain terms, conditions or liabilities against its retail end users.[188] Fourth, as noted in UCS' testimony on SBC's discriminatory application of Save and Winback eligibility requirements for retail offerings versus resale offerings, there is no guarantee that SBC will apply the same terms and conditions at resale that it applies at retail. Finally, for new purchases of telecommunications services by SBC retail end users, SBC can avoid the application of detrimental tariff terms and conditions caused by its subsequent tariff modifications by providing its retail end users an ICB irrespective of the new terms and/or conditions that UCS and other CLECs would be subject.

Q: Can't UCS insulate itself from a subsequent SBC tariff modification that adversely affects rates by passing that rate increase to its retail end users?

A: No, for a number of reasons, UCS cannot simply pass on any SBC imposed rate increase to its end users. First, similar to SBC's retail end users, UCS end users seek

[188] UCS can provide specific examples of SBC's waiver of terms, conditions and liabilities once its General Objections have been addressed.

guaranteed rates in exchange for a commitment to purchase services over a prescribed period of time. UCS would be at a significant competitive disadvantage if it could not offer its end users a "guaranteed rate" similar to the guaranteed rates that SBC offers its retail end users. Further, UCS would also be at a competitive disadvantage if it had to constantly modify its end user contracts to address each subsequent tariff modification SBC may unilaterally impose during the term of that UCS end users' contract. Even more important, SBC could create a Hobson's Choice for UCS—either continue to pass rate increases on, if possible, to its end users and dissatisfy those end users, or absorb the increases and become unprofitable.

Second, the form and nature of SBC's tariff modification may not be as simple as a rate increase or a lowering of a discount. Instead, as noted above, SBC might cut back on the services that receive the MARC volume discount, thereby resulting in a lower effective discount. Such a change might be difficult to translate to a UCS retail end user that is part of an aggregated end user base on a high-volume discount offering.

SBC's modification of one or more of the inputs that gives rise to the applicable rate or discount would be difficult, if not impossible, to reconcile and as provided above, will likely deprive UCS and its end users of the benefit of the bargain for which they contracted.

<u>Issue 32 – SBC's Attempt to Limit the Rates, Terms and Conditions That Apply to Services Purchased During the Term of the Agreement</u>

Q: Please summarize the dispute between UCS and SBC concerning Issue 32 - SBC's Attempt to Limit the Rates, Terms and Conditions That Apply to Services Purchased During the Term of the Agreement

A: The parties disagree whether the Agreement should include a survival clause that provides that the rates, terms and conditions of the Agreement will continue to apply to those

Service Agreements that were entered into during the term of the Agreement after the expiration of the Agreement. This issue is closely related to Issues 5 and 20. In Issue 20, the parties disagree as to whether a Service Agreement executed during the term of the Agreement should (1) expire in accordance with its own terms and survive the expiration of the Agreement or (2) automatically terminate with the Agreement. In Issue 5, the parties disagree whether the defined term "Service Agreement" should be included in the Agreement, which UCS believes is absolutely necessary to reconcile the conflicting terms among the various instruments that apply to UCS' purchase and SBC's provision of Resale Services.

The crux of this issue is whether UCS is entitled to receive the benefit of the rates, terms and conditions of this Agreement for the full term of any Service Agreement it enters into during the term of the Agreement. For the reasons set forth below and described elsewhere with respect to Issues 5, 20, 30 and 31, UCS believes it is. To ensure that result, the Agreement must include a survival provision that "cures" the fact that the Agreement, and each of its rates, terms and conditions, will expire well before the terms of the Service Agreements that are entered into during the term of the Agreement.

SBC has stated that it is not opposed to a survival clause in principle but has never commented on UCS' proposal in Section 27.1 of the Agreement.

Q: Why is a survival clause necessary?

A: As noted elsewhere, specifically with regard to Issues 5 and 20, there are at least two instruments—the Agreement and a Service Agreement—that will apply to UCS' purchase of Resale Services. These two agreements contain different and in many cases conflicting rates, terms and conditions; with one of the more significant differences being the term or length of the agreements. As discussed by UCS in Issues 19 and 20, the parties disagree on the term of the Agreement. SBC proposes just a one year term while UCS proposes a three year term. Regardless of how that disagreement is resolved, throughout the term of the Agreement UCS will be purchasing Resale Services that have a term commitment that expires later than the original expiration date of the Agreement. For example, six months into the Agreement UCS may purchase an Ameritech CompleteLink Offering that has a five year term commitment. UCS' purchase of this five year offering will be subject to the rates, terms and conditions of the Agreement but will be specifically "papered" by a Service Agreement that embodies UCS' specific commitment for the purchased Resale Services. As discussed in more detail with regard to Issues 5 and 30, the Service Agreement executed by UCS for that purchase will contain certain rates, terms and conditions that do not reflect what the true terms of purchase are; instead, to understand the true terms of purchase of those Resale Services, the Service Agreement must be read in conjunction with the Agreement and the Resale Tariff, and any conflicts among the three reconciled as provided in UCS proposed Section 2.10.2 of the Agreement. Thus, to determine the true terms of purchase for a given Resale Service it is necessary to consult the Agreement, both to reference rates, terms and conditions that apply to the Resale Services and to reconcile any conflict that may exist among the Agreement, the applicable Service Agreement and the Resale Tariff (or Resale Notification).

Because the Agreement will naturally expire before the majority, if not all, of the Service Agreements, the Agreement needs a survival clause to ensure that its rates, terms and conditions continue to apply to the surviving Service Agreements. Without a survival clause, the provisions of the Agreement would no longer be available to determine the true terms of purchase.

Q: Has SBC ever discussed its position on the need or propriety of a survival clause?

A: Only to a limited degree. At the onset of negotiations, when the parties first focused on the Appendix Resale, UCS proposed a survival clause in Section 4.4 of the Appendix Resale that is similar in form and substance to UCS' current proposal in Section 27.1 of the Agreement. In its review of that section, SBC noted that it was "[n]ot opposed to this [the survival clause] in principle, but may be covered by general agreement. If not, let's review the section references prior to final execution."[189] On UCS' proposal in Section 27.1 of the Agreement, SBC simply responded "Discuss".[190]

In follow-up discussions, SBC has not provided a substantive response on the issue, only that it was still reviewing the provision.

Q: What is UCS' specific contract proposal and why is it necessary to incorporate this language into the Agreement?

A: UCS' specific proposal is to include the following sentence in Section 27.1 of the Agreement:

> Further, the Parties acknowledge that the terms and conditions of this Agreement (including the Appendix Resale) that specifically apply to Resale Services purchased under a Service Agreement during the Term will survive the expiration of this Agreement and continue to apply to each such Service Agreement until the expiration or termination date of a Service Agreement entered into or purchased during the Term.

The above provision must be included in the Agreement because otherwise the rates, terms and conditions of this Agreement will no longer apply to Resale Services that were purchased

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[189] See P. Dorin comment at Section 4.4 of Appendix Resale, SBC Comments dated October 20, 2003, attached as UCS Exhibit 16.

by UCS on the basis of such rates, terms and conditions. Instead, those Resale Services will be subject to SBC's Resale Tariff. Specifically, as noted above with respect to Issues 5, 20 and 30, UCS is entitled to receive the benefit of its bargain on the Resale Services it has purchased for the entire term of its purchase commitment. Without UCS' proposed language in Section 27.1 of the Agreement, UCS will be deprived of its benefit of the bargain.

Q: Are survival clauses similar to that proposed by UCS common in the telecommunications industry?

A: Yes, in fact in almost all industries, when an "umbrella" or "master" agreement (for ease of reference, the "master agreement") contemplates that service orders, attachments or supplements ("sub-agreements") are executed to evidence a specific purchase of services under the master agreement, it is common to have the applicable terms and conditions (including rates) of the master agreement survive after expiration of the master agreement until the last expiration of the sub-agreements executed under the master agreement. In some cases, parties address the issue another way by tying the term of the master agreement to the term of the sub-agreements. Under that approach, to the extent the parties want to modify the rates, terms and conditions for future service purchases, they simply enter into a new and separate agreement that governs the future service purchases and allow the "old" master agreement to remain in effect to govern the "old" sub-agreements.

For example, in SBC's Master Discount Agreement, SBC structures the umbrella Master Discount Agreement to have a term that remains "in full force and effect for as long

[190] See P. Dorin comment at Section 27.1 of Agreement, SBC Comments dated October 20, 2003, *attached* as UCS Exhibit 16.

as there is an Attachment remaining in effect under this Agreement."[191] The structure of SBC's Master Discount Agreement and the Attachments executed thereunder that evidence "the Customer's commitment to purchase the services and products covered by that Attachment"[192] is analogous to the Agreement and the various Service Agreements UCS will execute to evidence its commitment to purchase Resale Services.

Q: Has SBC explained why it does not believe UCS' proposed language should be included in Section 27.1 of the Agreement?

A: No, SBC has not explained its position. As noted before, each time UCS requested a rationale, SBC simply stated "it would review the proposed language". SBC, however, never provided any substantive response on our proposed language or as to why SBC is opposed to it. Therefore, we have no idea why SBC opposes what should be an otherwise standard term.

Q: Does this conclude your statement?

A: Yes, it does.

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[191] See MDA, Section 1(A).

[192] *Id.* at Scope of Agreement.